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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 466

ESTHER JACKSON PORTER, AS EXECUTRIX, AND RICHARD L. DAVISSON, AS SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM H. PORTER, DECEASED, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 24, 1932

CERTIORARI GRANTED NOVEMBER 14, 1932

(37,163)

(37,163)

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BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 42815

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor of the Estate of William H. Porter, Deceased,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

For Taxpayer: Richard L. Davisson, Edw. N. Perkins.
For Commissioner: L. S. Pendleton, F. Schlosser.
Tran-ferred to Mr. Black 6-5-31.

DOCKET ENTRIES

1929.

Feb. 20. Petition received and filed. Taxpayer notified. (Fee paid.)
" 21. Copy of petition served on General Counsel.
Apr. 8. Answer filed by General Counsel.
" 9. Copy of answer served on taxpayer. General Calendar.

[fol. 2]

1930.

Aug. 20. Hearing set October 30, 1930.
Oct. 30. Hearing had before Herbert F. Seawell, Div. 4, on merits. Submitted. Briefs due December 15, 1930. Amendment to the answer filed.
Nov. 4. Transcript of hearing of October 30, 1930, filed.
" 8. Amendment to the petition filed by taxpayer.
" 8. Reply to the amendment to the answer filed by taxpayer.
" 17. Answer to the amendment to the petition filed by General Counsel. 11-19-30 copy served.
" 30. Stipulation of facts filed.
Dec. 4. Stipulation of facts filed.
" 13. Brief filed by General Counsel.
" 15. Brief filed by taxpayer.

1931.

June 30. Findings of fact and opinion rendered, Eugene Black, Div. 15. Decision will be entered under Rule 50.

July 8. Notice of settlement filed by General Counsel.

" 11. Hearing set July 29, 1931, on settlement.

" 22. Computation of deficiency filed by taxpayer.

" 25. Computation of deficiency filed by General Counsel. 7-27-31 copy served.

" 29. Hearing had before Mr. Smith on settlement under Rule 50. Referred to Mr. Black for order.

[fol. 3]

July 30. Order of final determination entered, Charles P. Smith, Div. 5.

1932.

Jan. 22. Petition for review by United States Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

" 22. Proof of service filed.

" 22. Notice of the appearance of Edward N. Perkins as counsel for taxpayer.

Feb. 9. Præcipe filed—proof of service thereon.

" 16. Agreed statement of evidence lodged.

" 17. Agreed statement of evidence approved and filed.

[fol. 4] Before United States Board of Tax Appeals

[Title omitted]

Petition—Filed February 20, 1929

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated December 22, 1928, and bearing the symbols JEK-4896-1st, N. Y., and as a basis of the proceeding allege, as follows:

1. The petitioner, Esther Jackson Porter, is an individual residing at Lattingtown Road, Glen Cove, Nassau County, New York. The petitioner, Richard L. Davisson, is an individual residing at 440 Park Avenue, Borough of

Manhattan, City of New York. Letters Testamentary under the Last Will and Testament of William H. Porter, deceased, who at the time of his death was a resident of the [fol. 5] City of Glen Cove, County of Nassau, State of New York, were granted to your petitioners by the Surrogate's Court of the County of Nassau, State of New York, on the 29th day of December, 1926, and your petitioners are now the duly qualified and acting Executors of the Last Will and Testament of said deceased.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioners on or about December 22, 1928.

3. The tax in controversy is a deficiency in the Federal Estate Tax assessed against the Estate of William H. Porter, deceased, in the sum of $103,768.22.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors made by the respondent:

(a) The inclusion by the respondent of the value of the transfer in trust alleged to have been created on November 27, 1926, and amounting (less the exemption) to $211,125.00 in ascertaining the decedent's gross estate for Federal Estate Tax purposes.

(b) The refusal of the respondent to allow as proper deductions as debts of the decedent the amounts paid by the Executors on account of pledges signed and obligations incurred by the decedent in favor of various charitable and [fol. 6] educational institutions for the reason that they were not deemed by the respondent obligations contracted for a consideration in money or money's worth.

(c) The error of the respondent in not allowing full credit for taxes actually paid as State Inheritance Taxes, as allowed in the Commissioner's letter, dated September 29, 1928.

5. The facts upon which the petitioners rely as a basis for this proceeding are as follows:

As to Paragraph 4a

The Transfer in Trust

(a) Upon information and belief that on or about October 18, 1918, the decedent executed a trust agreement with

Bankers Trust Company, as Trustee, dated October 18, 1918 (hereinafter called Trust No. 1) a copy of which is annexed hereto and marked "Exhibit B," the principal beneficiary of which was the decedent's daughter, Helen Porter Davisson. The trust provided in part that Helen Porter Davisson was to receive the income therefrom until attaining the age of thirty years, and on attaining such age she was to receive the principal thereof. In the event of her death before attaining the age of thirty years the principal was to be held in trust for the benefit of her child Richard L. Davisson, Jr. At that time Helen Porter [fol. 7] Davisson had no other children. The deed of trust provided that the decedent was to deliver to the Trustee the following securities:

$50,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued for rapid transit construction.

$50,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued to provide for supply of water,

and these securities were in fact delivered to the Trustee on or about the date of the instrument, to be held pursuant to the terms thereof.

(b) Upon information and belief that on or about the 1st day of February, 1919, a second deed of trust, dated February 1, 1919, was executed between Bankers Trust Company, as Trustee, and the decedent (hereinafter called Trust No. 2), a copy of which is hereto annexed and marked "Exhibit C," the principal beneficiary of which was the decedent's daughter, Helen Porter Davisson. This trust provided in part that Helen Porter Davisson was to receive the income therefrom until she attained the age of forty years and when she attained the age of forty years she was to receive the principal, and in the event of her death before attaining the age of forty years the principal thereof was to be held in trust for the benefit of her child [fol. 8] Richard L. Davisson, Jr. At that time Helen Porter Davisson had no other children. The deed of trust provided that the donor was to deliver to the Trustee the following securities:

$100,000 Corporate Stock of the City of New York for the construction of rapid transit railroads, dated December 4, 1918, bearing interest at 4½% per annum, principal due June 1, 1965,

and these securities were in fact delivered to the Trustee on or about the date of the instrument.

(c) Both of the above mentioned deeds of trust contained the following provision:

"Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing, executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York), delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part [fol. 9] of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned."

(d) The intent and motive of the decedent in creating the two trusts above mentioned was to provide a separate income for his daughter, Helen Porter Davisson, and said trusts were not made in contemplation of death. Said trusts were made more than seven years before the death of decedent.

(e) Subsequently to the execution of the two above mentioned deeds of trust, and prior to any modification thereof, [fol. 10] two more children, John Davisson and William Porter Davisson, were born to said Helen Porter Davisson.

(f) On or about November 27, 1926, the decedent, pursuant to the right reserved in paragraph "Tenth" in each of said two trusts (Exhibits B and C) modified said trusts by executing and delivering to Bankers Trust Company simultaneously three instruments, copies of which are annexed hereto and marked "Exhibit D", "Exhibit E" and Exhibit F", all dated November 27, 1926.

(g) The only changes in said Trust No. 1, dated October 18, 1918, and Trust No. 2, dated February 1, 1919, effected by the above-mentioned instruments of modification dated November 27, 1926, were as follows:

(1) The payment of the principal of Trust No. 1 to Helen Porter Davisson was postponed from the age of thirty to the age of forty.

(2) In case of the death of Helen Porter Davisson before the age of forty, the instruments of modification provided that the principal of both trust funds should be divided into as many equal shares as she shall leave children her surviving and deceased children who leave issue her surviving, and directed the application of said shares for the benefit [fol. 11] of said parties. This provision permitted the two children of Helen Porter Davisson, namely, Joan and William, born subsequently to the execution of the original trust indentures (Exhibits B and C) and prior to the execution of the instruments of modification on November 27, 1926, to share in the principal of the trust funds equally with their elder brother, Richard L. Davisson, Jr., who alone was mentioned as the contingent remainderman in the original deeds of trust.

(h) Upon information and belief that at the date of the modification of the said deeds of trust, namely, November 27, 1926, neither the decedent nor his physicians nor his family had any anticipation or expectation that his death would occur soon thereafter and there was no reason to believe or anticipate that the decedent did not have many years of life ahead of him.

(i) After the original delivery in 1918 and 1919 of the securities constituting the principal of the two above men-

tioned trusts to Bankers Trust Company, as Trustee, said securities never left the possession of said Bankers Trust Company as said Trustee, and are still held by said Trustee, under the terms of said Trust Agreements as modified as aforesaid. After the original delivery of said securities to said Trustee in 1918 and 1919, neither said decedent nor his estate has at any time had legal title to or any beneficial interest in said securities or in the proceeds thereof or income therefrom.

[fol. 12] (j) There was no transfer from the decedent or from the decedent's estate on November 27, 1926, of the securities constituting the principal of the above mentioned trusts. The only transfers from the decedent of said securities or any interest therein were the original transfers of 1918 and 1919.

(k) No power was reserved to the decedent in the two said deeds of trust (Exhibits B and C) above mentioned to revoke the same or any part thereof, and no action taken by the decedent, either alone or in conjunction with the trustee or others could legally effect the revocation thereof. No power was reserved to the decedent in said two deeds of trust (Exhibits B and C) to revest in himself or his estate any right, title or interest in the securities constituting the principal or income of said trusts and no action taken by the decedent, either alone or in conjunction with others could accomplish such an object.

(l) The petitioners allege that the only legal effect of the instruments dated November 27, 1926, above mentioned, was a modification of Trust No. 1, dated October 18, 1918, and Trust No. 2, dated February 1, 1919, pursuant to paragraph "Tenth" contained in each of said agreements, which modification in no way effected a transfer of interest to or from the decedent or his estate.

[fol. 13] As to Paragraph 4-B

Payments made by the executors to charitable and educational institutions pursuant to pledges made by decedent during his lifetime for which no deduction was allowed by respondent in computing the value of the decedent's net estate for Federal estate tax purposes

(m) On May 12, 1927, payment was made to James W. Townsend of the sum of $6,000. as the balance of a written

subscription or pledge of $12,000. made by decedent during his lifetime to the New North Country Community Hospital at Glen Cove, Long Island. This subscription was made by decedent for the specific purpose of equipping an X-Ray room in the said hospital as a memorial to decedent's son who lost his life in the World War. Upon information and belief, during the decedent's lifetime the construction of the said hospital was actually undertaken and an X-ray room was provided for therein in reliance on said promise.

(n) On May 12, 1927, there was paid to Princetown University the sum of $5,000. as the balance of a subscription of $25,000 made by decedent during his lifetime for the purpose of erecting in the University Chapel to be built at Princeton, New Jersey, a bay containing a Memorial Window in memory of decedent's son who lost his life in the [fol. 14] World War. Upon information and belief, Princeton University had procured drawings and sketches of such bay and window to be made and had actually contracted for and commenced construction of the same during decedent's lifetime in reliance on said subscription.

(o) On May 27, 1927, petitioners paid to the Boy Scouts of Nassau County the sum of $1,000 in payment of a subscription made by decedent on June 28, 1926, for the purpose of purchasing a 600 acre camp in Nassau County for the Boy Scouts of that County. Upon information and belief, an option on the said camp site expiring July 1, 1926, was exercised and the land purchased by the Boy Scouts of Nassau County during the decedent's lifetime, and in reliance on the subscriptions of decedent and others.

(p) On May 12, 1927, petitioners paid to the Hampton Tuskegee Endowment Fund the sum of $500. as the balance of a written subscription of $1,000. to this fund made by decedent during his lifetime. Upon information and belief that this subscription was made in order that the terms of a conditional subscription, conditioned upon a certain amount being raised, might be complied with; that as a result of the subscription of decedent and those of others, the fund was raised and the terms of the conditional subscrip-

tion were met, and the amount of the conditional subscrip-
[fol. 15] tion was paid, all during the lifetime of decedent.

(q) On May 27, 1927, petitioners paid to the Nassau Hospital Association the sum of $500 in payment of a pledge made by decedent on October 26, 1926, to a fund for the building of the new Nurses Home for the Hospital. Upon information and belief, the construction of the said Nurses Home was undertaken by the Hospital and subsequently completed, in reliance upon the subscriptions of decedent and others.

(r) On May 27, 1927, petitioners paid the Civic Forum of New York City the sum of $25.00 on account of the written agreement made by decedent during his lifetime to underwrite the cost of meetings of the Civic Forum during the season of 1926-1927. Upon information and belief that in reliance upon the undertakings of decedent and others, various meetings were held during the said season resulting in a deficit at the end thereof of which the proportion assumed by decedent amounted to the sum of $25.00.

No deduction of any part of the aforesaid sums, paid by petitioners and aggregating $13,025.00 has been allowed by respondent in computing the value of the net estate of the decedent for estate tax purposes.

[fol. 16] As to Paragraph 4-C

Credit for State Inheritance Taxes

(s) Attached to the notice of deficiency from the Commissioner of Internal Revenue dated December 22, 1928, was a statement consisting of two pages as set forth in the copy of said notice attached hereto and marked Exhibit A. On the second page of such statement there is set forth a computation of the amount proposed for assessment in which statement allowance is made for "Credit for State Inheritance Taxes" in the sum of $226,815.16. The actual amount paid by petitioners for State Inheritance Taxes and allowed by the Commissioner of Internal Revenue in a letter to petitioners dated September 29, 1928, was $226,855.16 and this amount should have been set forth on the said statement in lieu of the amount above stated.

(t) The foregoing sum does not include the amount of $750,000.00 paid by the petitioners on account of the New York Estate Tax for which no credit has been given by the respondent because the New York State Tax Commission refuses to finally determine the amount of the tax until the amount of the Federal Estate Tax has been finally determined.

Wherefore petitioners pray that this Board may hear and re-determine the deficiency alleged in accordance with the foregoing.

Dated February 19th, 1929.

(Sgd.) Richard L. Davisson, Counsel for Petitioners. Office and Post Office address: 128 Broadway, New York City.

[fol. 17] *Duly sworn to by Richard L. Davisson. Jurat omitted in printing.*

[fol. 18] EXHIBIT A TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

MT-ET-C1.-4896-JEK.
District of: 1st New York.
Estate of: William H. Porter.
Date of death: November 30, 1926.

Dec. 22, 1928.

Richard L. Davisson et al., executors, estate of William H. Porter, 128 Broadway, New York, New York.

SIRS: The Bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of September 29, 1928. The deficiency hereby determined amounts to $103,768.22, and is fully explained in the attached statement, consisting of two pages, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the six-[fol. 19] tieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination

of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said Board within the 60 day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver [fol. 20] should be executed with respect to the amount of the deficiency to which you agree.

Respectfully, (Signed) H. D. Mires, Acting Commissioner.

Enclosures: Statement, Waiver—Form 890.
CLE.

MT-ET-C1-4896-JEK-1st New York.
Estate of William H. Porter.

The estate's protest arises in connection with the following items:

	Gross Estate		
Stocks and bonds	Returned	Tentatively determined	Determined
Stocks:			
Item 27	$0.00	$3,000.00	$0.00
Transfers:			
Transfer in trust made October 18, 1918	0.00	107,500.00	0.00
Transfer in trust made February 1, 1919	0.00	108,625.00	0.00
Transfer in trust made November 27, 1926	0.00	216,125.00	211,125.00

Deductions			
Funeral expenses	160,902.74	130,198.74	158,420.71
Miscellaneous administration expenses	57,509.05	26,826.18	33,677.53
Debts of decedent	1,196,602.76	1,022,766.82	1,143,600.06

After a careful consideration of all the evidence on file in this case it appears that the preferred stock of the Gen- [fol. 21] eral Heating Corporation of America was without value at the date of decedent's death and adjustment has accordingly been made.

It has been determined by the Bureau that the transfers made by way of trusts created by decedent on October 18, 1918 and February 1, 1919, are not taxable as part of his estate and proper adjustment has herein been made. However, the trust created November 27, 1926, is under Section 302(c) of the Revenue Act of 1926, part of decedent's estate for estate tax purposes and no adjustment is warranted in the tentative determination, except the allowance of an exemption of $5,000.00 in the value determined for the trust property. The value of this trust is, therefore, $211,125.00, as indicated above.

Evidence having been presented showing the payment of additional funeral expenses and miscellaneous administration expenses, the adjustments warranted have herein been made.

Under "Debts of decedent" deduction is allowed for the items which the evidence discloses constituted proper obligations against the decedent's estate. Under this caption no allowance has been made for the amounts claimed for pledges made by the decedent. These are not deemed obligations contracted for a consideration in money or money's worth.

The following computation shows the estate tax liability of this estate which is hereby made final:

[fol. 22]

	Returned	Tentatively determined	Determined
Gross estate	$11,796,856.34	$12,238,155.05	$12,014,030.05
Deductions	2,491,310.26	2,006,428.88	2,162,335.44
Net estate	9,305,546.08	10,231,726.17	9,851,694.61
Tax liability	1,221,553.76	1,390,845.23	1,325,321.98
Deficiency	.....	178,291.47	103,768.22
Tax liability		1,325,321.98	
Credit for State inheritance taxes		226,815.16	
Tax less credit		1,098,506.82	
Returned tax due		994,738.60	
Amount proposed for assessment		103,768.22	

The amount proposed for assessment will bear interest at the rate of six per centum per annum from one year after date of decedent's death to the date of assessment or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

Any amount of unpaid returned tax bears interest at the rate of one per centum a month from one year after the date of decedent's death until payment is received by the Collector of Internal Revenue at Brooklyn, New York.

CLE.

[fol. 23] EXHIBIT B TO PETITION

Bankers Trust Company, New York

(Federal Estate Tax Return)

Supporting Schedule "E"

Helen Porter Davisson Trust No. 1

This indenture made the 18th day of October, 1918, between William H. Porter, of Glen Cove, Nassau County, New York, party of the first part (hereinafter called the "Donor") and Bankers Trust Company, a corporation of the State of New York, having its principal offices in the Borough of Manhattan, City and State of New York, party of the second part, (hereinafter called the "Trustee").

Whereas, the Donor desires to create a trust of the property and for the purposes hereinafter mentioned.

Now, Therefore, this Indenture Witnesseth, That in consideration of the premises, the mutual covenants herein contained, and of other good and valuable considerations, and of the sum of One Dollar ($1.00) to him in hand paid by the Trustee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Donor has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assign, [fol. 24] set over and deliver unto said Trustee its successors and assigns the following described property and securities, to wit:

$50,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued for rapid transit construction

$50,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued to provide for supply of water

Together with the appurtenances, and all the estate and rights of the Donor.

To have and to hold all and singular the above granted and described property and securities unto said Trustee, its successors and assigns, in trust, nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set forth.

First. To receive, hold, manage, sell, invest and reinvest the same and every part thereof, in the manner hereinafter specified and to collect, recover and receive the rents, issues, interest, income and profits thereof, and after deducting the commissions of the Trustee as hereinafter provided, and the proper and necessary expenses in connection with the administration of the trust, to pay over the balance thereof, hereinafter called "Income," unto Helen Porter [fol. 25] Davisson, the daughter of the Donor, until she shall attain the age of thirty years, and thereupon to convey, transfer and pay over to her, the said Helen Porter Davisson, the principal of this trust for her own use absolutely and forever.

In case of the death of said Helen Porter Davisson before she shall attain the age of thirty years, then upon her death to continue the trust for the benefit of her son, Richard L. Davisson, Jr., and during his minority to apply such amount of income for the maintenance, education and support of said Richard L. Davisson, Jr., as in the judgment of his father Richard L. Davisson may be necessary, and to accumulate the balance during minority, and upon the said Richard L. Davisson, Jr., attaining his majority to pay over to him the accumulation of income, if any, and thereafter the income upon the trust until he shall attain the age of thirty years, at which time to convey, transfer and pay over the principal of the trust to said Richard L. Davisson, Jr., for his own use absolutely and forever.

In case of the death of Richard L. Davisson, Jr., before he shall attain the age of thirty years (but only in the event of the death of Helen Porter Davisson before she shall attain the age of thirty years), to convey, transfer and pay over one fourth of the principal of the trust to Richard L. Davisson, if then living, and the balance thereof or the entire principal of the trust, if said Richard L. Davisson shall not then be living, to the issue of said Richard L. Davisson, Jr., in equal shares, and in default of issue surviving said Richard L. Davisson, Jr., then such balance [fol. 26] thereof or the entire principal of the trust if said Richard L. Davisson shall not then be living, to James J. Porter, son of the Donor, for his own use, and in case of his prior death in equal shares to the issue of said James J. Porter then living.

Second. The Trustee is authorized and empowered to retain, subject to the provisions hereof, any and all of the securities hereinbefore described in their present form, and also such additional properties as the Donor may from time to time add to the trust estate.

All investments or reinvestments made by the Trustee shall be subject to the control and written directions of the Donor during his lifetime, and the Trustee shall be fully protected in making any sale, investment or reinvestment as shall be directed by the Donor in writing during his lifetime and shall not be liable in any way for depreciation or loss incurred by reason of such sale, investment or reinvestment.

In the absence of any such written directions from the Donor, the Trustee shall be authorized to make such sales, investments or reinvestments as to the Trustee may seem proper and to the advantage of the estate, without regard to the investments prescribed by the laws of the State of New York for legal trust investments.

Upon the death of the Donor all investments or reinvestments shall be left to the discretion and judgment of the Trustee, with full power and authority to retain any and all securities constituting the principal of the trust fund, [fol. 27] and all further sales, investments or reinvestments shall be subject only to the control and discretion of the Trustee, and the Trustee shall not necessarily be limited to those securities prescribed by the laws of the State of New York for legal trust investments.

Subject to the limitations above prescribed, the Trustee shall have full power to sell and transfer any and all of said securities or any other property, real or personal, that may be taken under the terms of the trust, and to execute and deliver sufficient assignments, releases or satisfactions of bonds and mortgages, or other securities, or to sell and convey any real estate forming part of the trust estate and to execute, acknowledge and deliver good and sufficient deed or deeds of conveyance therefor.

No purchaser upon any sale by the Trustee shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the validity, expediency or propriety of any such sale.

Third. In any case in which the Trustee is required, pursuant to the provisions of this indenture to divide the principal of the trust estate into parts or shares, or to distribute the same, it is authorized and empowered in its sole discretion to make such division or distribution in kind, or partly in kind and partly money, and for the purpose of such allotment the judgment of the Trustee concerning the propriety thereof, and the relative value for the purpose of division or distribution of the property and securities [fol. 28] so allotted, shall be binding and conclusive on all persons and corporations interested therein.

Fourth. Subject to the limitations above prescribed the Trustee is authorized and empowered to vote in person or by proxy upon all stocks or other securities held by it; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation, at such times and upon such terms and conditions as the Trustee shall deem proper, to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation, or to the lease by any person or corporation of his or its property or any portion thereof, to such corporation, and upon such reorganization, consolidation, merger sale or lease to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as the Trustee may deem expedient for the protection of its interests as holder of any stocks, bonds or other securities

of any corporation, and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities, or take advantage of any rights to subscribe for additional stocks, bonds or other securities and to make any and all necessary payments therefor, and generally to exercise in respect of all stocks, bonds or other investments held by the Trustee hereunder all rights, powers and privileges as are or may be lawfully [fol. 29] exercised by any person owning similar property in his own right provided, however, that the Trustee shall not be required to make any of the payments herein provided, except from the principal of the trust fund, or from funds furnished from the principal of the trust fund, or from funds furnished for that purpose by the Donor.

In the event that the Trustee shall request from the Donor written instructions as to the action which it shall take in regard to any of the matters set forth in this paragraph, and the Donor shall neglect or refuse to furnish such instructions for a period of ten (10) days, or in the event that the Donor shall be unable for any reason to furnish such instructions, the Trustee is hereby authorized and empowered to take such action in regard to such matters as it may deem proper and desirable.

The Donor hereby expressly reserves to himself the privilege of increasing the principal of the trust estate, at any time by adding thereto personal property and securities which the Trustee shall receive, hold, manage, sell, invest and reinvest in the same manner as hereinbefore specified in respect of the securities forming part of the original fund.

Fifth. The Trustee may in its sole discretion cause the securities which may from time to time comprise the trust fund, or any part thereof, to be registered in its name as Trustee hereunder, or in its own name, or in the name of its nominee, or to take and keep the same unregistered, and [fol. 30] to retain them or any part thereof, in such condition that they will pass by delivery.

Sixth. The Trustee shall be entitled to receive as compensation for its services in the administration of this trust, a commission of one per cent. (1%) per annum upon income,

and is hereby authorized to deduct such commission before paying the income to the beneficiary hereunder.

The Trustee also shall be entitled to a commission of one per cent. (1%) upon the market value of the trust fund when and as the trust shall terminate upon the death of the beneficiary above named.

The Trustee is also authorized, in the discharge of its duties, to employ counsel and agents and to determine and pay to them reasonable compensation, and it shall be entitled to reimbursement for the same, and for such other expenses and charges as it may deem necessary and proper to incur.

Seventh. The Donor covenants and agrees to make, execute and deliver in due form of law such other and further assignments, conveyances or other instruments as the Trustee may deem requisite or necessary to effectuate the purposes hereof.

Eighth. The Trustee is further authorized and empowered to pay out of the income received from the trust fund any and all taxes which properly may become payable from time to time, under the laws of the United States, or of any [fol. 31] State, County or Municipality on said trust property, or for any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws.

Ninth. In case of securities taken or purchased for said trust fund at a premium, the Trustee shall not be bound to set aside any part of the income thereof as a sinking fund to retire or absorb such premium.

Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration

said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instru- [fol. 32] ments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned.

Eleventh. The Trustee by joining in the execution of this instrument, signifies its acceptance of the trust.

Twelfth. It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

This instrument is made in duplicate, each of which is an original, but both taken together shall be deemed one and the same instrument.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by a Vice-President, [fol. 33] and its corporate seal to be hereunto affixed and attested by an Assistant Secretary as of the day and year first above written.

Wm. H. Porter. (Seal.) Signed, sealed and delivered in the presence of T. F. Mallaby. Bankers Trust Company, by F. N. B. Close, Vice-President. Attest: —— ——, Assistant Treasurer.

State of New York,
County of New York, ss:

On this 18th day of October, 1918, before me personally came William H. Porter, to me known and known to me

to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

Wm. A. Merrick, Notary Public. Kings County, N. Y. Ctf. No. 68. Certificate filed in New York County No. 132. Register's Office N. Y. County Ctf. No. 10145. Register's Office Kings County N. Y. Ctf. No. 160.

[fol. 34] State of New York,
County of New York, ss:

On this 18th day of October, 1918, before me personally came F. N. B. Close, to me known, who, being by me duly sworn, did depose and say that he resides at Cranford, N. J.; that he is a Vice-President of Bankers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

J. F. Grodley, Notary Public, etc.

Exhibit C to Petition

Bankers Trust Company, New York

Supporting Schedule "E"

Helen Porter Davisson Trust No. 2

(Federal Estate Tax)

This Indenture made the 1st day of February, 1919, between William H. Porter, of Glen Cove, Nassau County, [fol. 35] New York, party of the first part (hereinafter called the "Donor"), and Bankers Trust Company, a corporation of the State of New York, having its principal offices in the Borough of Manhattan, City and State of New York, party of the second part, (hereinafter called the "Trustee").

Whereas, the Donor desires to create a trust of the property and for the purposes hereinafter mentioned,

Now, therefore, this indenture witnesseth, That in consideration of the premises, the mutual covenants herein contained, and of other good and valuable considerations, and of the sum of One Dollar ($1.00) to him in hand paid by the Trustee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Donor has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assigns, set over and deliver unto said Trustee, its successors and assigns, the following described property and securities, to wit:

$100,000 Corporate Stock of the City of New York for the construction of rapid transit railroads, dated December 4, 1918, bearing interest at 4½% per annum, principal due June 1, 1965.

Together with the appurtenances, and all the estate and rights of the Donor.

[fol. 36] To have and to hold all and singular the above granted and described property and securities unto said Trustee, its successors and assigns, in trust nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set forth.

First. To receive, hold, manage, sell, invest and reinvest the same and every part thereof, in the manner hereinafter specified, and to collect, recover and receive the rents, issues, interest, income and profits thereof, and after deducting the commissions of the Trustee as hereinafter provided, and the proper and necessary expenses in connection with the administration of the trust, to pay over the balance thereof, hereinafter called "Income," unto Helen Porter Davisson, the daughter of the Donor, semi-annually, until she shall attain the age of forty years, and thereupon to convey, transfer and pay over to her, the said Helen Porter Davisson, the principal of this trust for her own use absolutely and forever.

In case of the death of said Helen Porter Davisson before she shall attain the age of forty years, then upon her death to continue the trust for the benefit of her son, Rich-

ard L. Davisson, Jr., and during his minority to apply such amount of income for the maintenance, education and support of said Richard L. Davisson, Jr., as in the judgment of his father Richard L. Davisson may be necessary, and to accumulate the balance during minority, and upon the [fol. 37] said Richard L. Davisson, Jr., attaining his majority to pay over to him the accumulation of income, if any, and thereafter the income upon the trust until he shall attain the age of thirty years, at which time to convey, transfer and pay over the principal of the trust to said Richard L. Davisson, Jr., for his own use absolutely and forever.

In case of the death of Richard L. Davisson, Jr., before he shall attain the age of thirty years (but only in the event of the death of Helen Porter Davisson before she shall attain the age of forty years), to convey, transfer and pay over one-fourth of the principal of the trust to Richard L. Davisson, if then living, and the balance thereof or the entire principal of the trust, if said Richard L. Davisson shall not then be living, to the issue of said Richard L. Davisson, Jr., in equal shares, and in default of issue surviving said Richard L. Davisson, Jr., then such balance thereof or the entire principal of the trust, if said Richard L. Davisson shall not then be living, in equal shares to the children of Helen Porter Davisson then living, if any there be, and in default of children, then to Jane Hetherington Porter for her own use.

Second. The Trustee is authorized and empowered to retain, subject to the provisions hereof, any and all of the securities hereinbefore described in their present form, and also such additional properties as the Donor may from time to time add to the trust estate.

All investments or reinvestments made by the Trustee [fol. 38] shall be subject to the control and written directions of the Donor during his lifetime, and the Trustee shall be fully protected in making any sale, investment or reinvestment as shall be directed by the Donor in writing during his lifetime and shall not be liable in any way for depreciation or loss incurred by reason of such sale, investment or reinvestment.

In the absence of any such written directions from the Donor, the Trustee shall be authorized to make such sales,

investments and reinvestments as to the Trustee may seem proper and to the advantage of the estate, without regard to the investments prescribed by the laws of the State of New York for legal trust investments.

Upon the death of the Donor all investments or reinvestments shall be left to the discretion and judgment of the Trustee, with full power and authority to retain any and all securities constituting the principal of the trust fund, and all further sales, investments or reinvestments shall be subject only to the control and discretion of the Trustee, and the Trustee shall not necessarily be limited to those securities prescribed by the laws of the State of New York for legal trust investments.

Subject to the limitations above prescribed, the Trustee shall have full power to sell and transfer any and all of said securities or any other property, real or personal, that may be taken under the terms of the trust, and to execute and deliver sufficient assignments, releases or satisfactions of bonds and mortgags, or other securities, or to sell and convey any real estate forming part of the trust estate and [fol. 39] to execute, acknowledge and deliver good and sufficient deed or deeds of conveyance therefor.

No purchaser upon any sale by the Trustee shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the validity, expediency or propriety of any such sale.

Third. In any case in which the Trustee is required, pursuant to the provisions of this indenture to divide the principal of the trust estate into parts or shares, or to distribute the same, it is authorized and empowered in its sole discretion to make such division or distribution in kind, or partly in kind and partly money, and for the purpose of such allotment the judgment of the Trustee concerning the propriety thereof, and the relative value for the purpose of division or distribution of the property and securities so allotted, shall be binding and conclusive on all persons and corporations interested therein.

Fourth. Subject to the limitations above prescribed the Trustee is authorized and empowered to vote in person or by proxy upon all stocks or other securities held by it; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation, at

such times and upon such terms and conditions as the Trustee shall deem proper; to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation, or to the lease by any person or [fol. 40] corporation of his or its property or any portion thereof, to such corporation, and upon such reorganization, consolidation, merger, sale or lease to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as the Trustee may deem expedient for the protection of its interests as holder of any stocks, bonds or other securities of any corporation and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities, or take advantage of any rights to subscribe for additional stocks, bonds or other securities and to make any and all necessary payments therefor, and generally to exercise in respect of all stocks, bonds or other investments held by the Trustee hereunder all rights, powers and privileges as are or may be lawfully exercised by any person, owning similar property in his own right, provided, however, that the Trustee shall not be required to make any of the payments herein provided, except from the principal of the trust fund, or from funds furnished for that purpose by the Donor.

In the event that the Trustee shall request from the Donor written instructions as to the action which it shall take in regard to any of the matters set forth in this paragraph, and the Donor shall neglect or refuse to furnish such instructions for a period of ten (10) days, or in the event that the Donor shall be unable for any reason to furnish such instructions, the Trustee is hereby authorized and [fol. 41] empowered to take such action in regard to such matters as it may deem proper and desirable.

The Donor hereby expressly reserves to himself the privileges of increasing the principal of the trust estate, at any time by adding thereto personal property and securities which the Trustee shall receive, hold, manage, sell, invest and reinvest in the same manner as hereinbefore specified in respect of the securities forming part of the original fund.

Fifth. The Trustee may in its sole discretion cause the securities which may from time to time comprise the trust fund, or any part thereof, to be registered in its name as Trustee hereunder, or in its own name, or in the name of its nominee, or to take and keep the same unregistered, and to retain them or any part thereof, in such condition that they will pass by delivery.

Sixth. The Trustee shall be entitled to receive as compensation for its services in the administration of this trust, a commission of one per cent. (1%) per annum upon income, and is hereby authorized to deduct such commission before paying the income to the beneficiary hereunder.

The Trustee also shall be entitled to a commission of one per cent. (1%) upon the market value of the trust fund when and as the trust shall terminate.

The Trustee is also authorized, in the discharge of its duties, to employ counsel and agents and to determine and pay to them reasonable compensation, and it shall be [fol. 42] entitled to reimbursement for the same, and for such other expenses and charges as it may deem necessary and proper to incur.

Seventh. The Donor covenants and agrees to make, execute, and deliver in due form of law such other and further assignments, conveyances or other instruments as the Trustee may deem requisite or necessary to effectuate the purposes hereof.

Eighth. The Trustee is further authorized and empowered to pay out of the income received from the trust fund any and all taxes which properly may become payable from time to time, under the laws of the United States, or of any state, county or municipality on said trust property, or for any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws.

Ninth. In case of securities taken or purchased for said trust fund at a premium, the Trustee shall not be bound to set aside any part of the income thereof as a sinking fund to retire or absorb such premium.

Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance

of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the [fol. 43] manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the devised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof, but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned.

Eleventh. The Trustee by joining in the execution of this instrument, signifies its acceptance of the trust.

[fol. 44] Twelfth. It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

This instrument is made in duplicate, each of which is an original, but both taken together shall be deemed one and the same instrument.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by a Vice-President, and its corporate seal to be hereunto affixed and

attested by an Assistant Secretary as of the day and year first above written.

Wm. H. Porter. Signed, sealed and delivered in the presence of T. F. Mallaby. Bankers Trust Company, by F. N. B. Close, Vice-President. Attest: B. Page, Assistant Secretary.

[fol. 45] STATE OF NEW YORK,
County of New York, ss:

On this 12th day of May, 1919, before me personally came William H. Porter, to me known and known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

Thos. W. Joyce, Notary Public, Kings County, N. Y. Ctf. No. 22. Certificate filed in New York County No. 28. Register's Office N. Y. County Ctf. No. 10,020.

STATE OF NEW YORK,
County of New York, ss:

On this 13th day of May, 1919, before me personally came F. N. B. Close to me known, who, being by me duly sworn, did depose and say that he resides at New York City, N. Y.; that he is a Vice-President of Bankers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

J. G. Gradley, Notary Public, Westchester County. Certificate filed in New York County No. 272. New York Register's No. 10207. My commission expires March 30th, 1920.

[fol. 46] EXHIBIT D TO PETITION

Supporting Schedule "E"

(Federal Estate Tax Return)

November 27, 1926.

Trust No. 1

Bankers Trust Company, as trustee under deed of trust made by William H. Porter on October 18, 1918, in favor of his daughter, Helen Porter Davisson, and other beneficiaries.

DEAR SIRS: Pursuant to the power reserved by me in the Tenth Article of the above described Deed of Trust, I hereby revoke said Deed and terminate the interests of all persons therein, and I hereby direct you to deliver the principal thereof, all income on such principal accrued but not actually received, and all income thereon received but not as yet distributed to the beneficiary, to yourselves as Trustee under a new Deed of Trust dated the same date as this letter and executed by me in favor of said Helen Porter Davisson and other beneficiaries, such principal to be held by you as principal of the new trust and such income, whether accrued or received, to be treated by you as you would have treated that income under the trust which I now revoke.

Very truly yours, Wm. H. Porter. (Seal.)

[fol. 47] STATE OF NEW YORK,
County of New York, ss:

On this 27th day of November, 1926, before me personally came William H. Porter, to me known to be the individual described in and who executed the foregoing Revocation and acknowledged to me that he executed the same.

James J. McDermott, Notary Public, Bronx Co. No. 25, Reg. No. 2707. Cert. filed in N. Y. Co. No. 253, Reg. No. 7172. Queens Co. 1919, and Westchester Co. Commission expires March 30, 1927.

EXHIBIT E TO PETITION

Supporting Schedule "E"

(Federal Estate Tax Return)

November 27, 1926.

Trust No. 2

Bankers Trust Company, as trustee under deed of trust made by William H. Porter on February 1, 1919, in favor of his daughter, Helen Porter Davisson, and other beneficiaries.

DEAR SIRS: Pursuant to the power reserved by me in the Tenth Article of the above described Deed of Trust, I [fol. 48] hereby revoke said Deed and terminate the interests of all persons therein, and I hereby direct you to deliver the principal thereof, all income on such principal accrued but not actually received, and all income thereon received by you not as yet distributed to the beneficiary, to yourselves as Trustee under a new Deed of Trust dated the same date as this letter and executed by me in favor of said Helen Porter Davisson and other beneficiaries, such principal to be held by you as principal of the new trust and such income, whether accrued or received, to be treated by you would have treated that income under the trust which I now revoke.

Very truly yours, Wm. H. Porter. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of November, 1926, before me personally came William H. Porter, to me known to be the individual described in and who executed the foregoing Revocation and acknowledged to me that he executed the same.

James J. McDermott, Notary Public, Bronx Co., No. 25, Reg. No. 2707. Cert. filed in N. Y. Co. No. 253, Reg. No. 7172. Queens Co. 1919, and Westchester Co. Commission expires March 30, 1927.

[fol. 49] EXHIBIT F TO PETITION

Bankers Trust Company, New York

(Federal Estate Tax Return)

Supporting Schedule E

Helen Porter Davisson Trust No. 3

This Indenture made the 27th day of November, 1926, between William H. Porter, of Glen Cove, Nassau County, New York, party of the first part (hereinafter called the "Donor"), and Bankers Trust Company, a corporation of the State of New York, having its principal offices in the Borough of Manhattan, City and State of New York, party of the second part, (hereinafter called the "Trustee").

Whereas, the Donor desires to create a trust of the property and for the purposes hereinafter mentioned.

Now, Therefore, this Indenture Witnesseth, That in consideration of the premises, the mutual covenants herein contained, and of other good and valuable considerations, and of the sum of One Dollar ($1.00) to him in hand paid by the Trustee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the [fol. 50] Donor has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assign, set over and deliver unto said Trustee, its successors and assigns, the following described property and securities, to wit:

$100,000 Corporate Stock of the City of New York for the construction of rapid transit railroads, dated December 4, 1918, bearing interest at 4½% per annum, principal due June 1, 1965.

50,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued for rapid transit construction.

50,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued to provide for supply of water.

Together with the appurtenances, and all the estate and rights of the Donor.

To Have and to Hold all and singular the above granted and described property and securities unto said Trustee, its successors and assigns, In Trust, Nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set forth.

[fol. 51] First. To receive, hold, manage, sell, invest and reinvest the same and every part thereof, in the manner hereinafter specified, and to collect, recover and receive the rents, issues, interest, income and profits thereof, and after deducting the commissions of the Trustee as hereinafter provided, and the proper and necessary expenses in connection with the administration of the trust, to pay over the balance thereof, hereinafter called "Income", unto Helen Porter Davisson, the daughter of the Donor, semi-annually, until she shall attain the age of forty years, and thereupon to convey, transfer and pay over to her, the said Helen Porter Davisson, the principal of this trust for her own use absolutely and forever.

In case of the death of said Helen Porter Davisson before she shall attain the age of forty years, then upon her death to divide the principal of the trust into as many equal shares as she shall leave children her surviving and deceased children who leave issue her surviving, to assign, transfer and pay over to each child of hers her surviving who was born after the date of this indenture the share so set apart for such child, to assign, transfer and pay over to the issue of any deceased child of hers per stirpes and not per capita the share so set apart for such issue, and to continue in trust for the benefit of each child of hers her surviving in being at the date of this indenture the share so set apart for such child until he or she attains the age of thirty years, at which time to assign, transfer and pay [fol. 52] over the principal of said trust to such children for his or her own use absolutely and forever.

During the minority of any child for whom a share is held in trust, the Trustee is directed to pay out or apply all or such part of the income of his or her share as may in the unrestricted discretion of the Trustee seem desirable for the proper education and comfortable maintenance and support of such child and to accumulate, invest and reinvest any unexpended balance and upon the arrival of such child

at the age of twenty-one years to pay such accumulation and all increases thereof to such child absolutely and forever. After the arrival of any such child at the age of twenty-one years, the Trustee is directed to pay over to him or her all of the income of his or her trust semi-annually.

In case of the death of a child of the said Helen Porter Davisson for whom a share is held in trust as aforesaid before he or she shall attain the age of thirty years (but only in the event of the death of said Helen Porter Davisson before she shall attain the age of forty years) the Trustee is directed to assign, transfer and pay over the principal of said trust to the issue of such child per stirpes and not per capita, but if there be no such issue, then in equal parts to the children of said Helen Porter Davisson then surviving and issue of deceased children, the issue of deceased children to take per stirpes and not per capita, but if there be no such children or issue of such deceased children, then to Jamie Porter, the granddaughter of the Donor, for her own use, absolutely and forever.

[fol. 53] Second. The Trustee is authorized and empowered to retain, subject to the provisions hereof, any and all of the securities hereinbefore described in their present form, and also such additional properties as the Donor may from time to time add to the trust estate.

All investments or reinvestments made by the Trustee shall be subject to the control and written directions of the Donor during his lifetime, and the Trustee shall be fully protected in making any sale, investment or reinvestment as shall be directed by the Donor in writing during his lifetime and shall not be liable in any way for depreciation or loss incurred by reason of such sale, investment or reinvestment.

In the absence of any such written directions from the Donor, the Trustee shall be authorized to make such sales, investments or reinvestments as to the Trustee may seem proper and to the advantage of the estate, without regard to the investments prescribed by the laws of the State of New York for legal trust investments.

Upon the death of the Donor all investments or reinvestments shall be left to the discretion and judgment of the

Trustee, with full power and authority to retain any and all securities constituting the principal of the trust fund, and all further sales, investments or reinvestments shall be subject only to the control and discretion of the Trustee, and the Trustee shall not necessarily be limited to those securities prescribed by the laws of the State of New York for legal trust investments.

[fol. 54] Subject to the limitations above prescribed, the Trustee shall have full power to sell and transfer any and all of said securities or any other property, real or personal, that may be taken under the terms of the trust, and to execute and deliver sufficient assignments, releases or satisfactions of bonds and mortgages, or other securities, or to sell and convey any real estate forming part of the trust estate and to execute, acknowledge and deliver good and sufficient deed or deeds of conveyance therefor.

No purchaser upon any sale by the Trustee shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the validity, expediency or propriety of any such sale.

Third. In any case in which the Trustee is required, pursuant to the provisions of this indenture to divide the principal of the trust estate into parts or shares, or to distribute the same, it is authorized and empowered in its sole discretion to make such division or distribution in kind, or partly in kind and partly money, and for the purpose of such allotment the judgment of the Trustee concerning the propriety thereof, and the relative value for the purpose of division or distribution of the property and securities so allotted, shall be binding and conclusive on all persons and corporations interested therein.

Fourth. Subject to the limitations above prescribed the Trustee is authorized and empowered to vote in person or [fol. 55] by proxy upon all stocks or other securities held by it; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation, at such times and upon such terms and conditions as the Trustee shall deem proper; to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion

thereof, to any person or corporation, or to the lease by any person or corporation of his or its prperty or any portion thereof, to such corporation, and upon such reorganization, consolidation, merger, sale or lease to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as the Trustee may deem expedient for the protection of its interests as holder of any stocks, bonds or other securities of any corporation, and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities, or take advantage of any rights to subscribe for additional stocks, bonds or other securities and to make any and all necessary payments therefor, and generally to exercise in respect of all stocks, bonds or other investments held by the Trustee hereunder all rights, powers and privileges as are or may be lawfully exercised by any person owning similar property in his own right provided, however, that the Trustee shall not be required to make any of the payments herein provided, except from the principal of the trust fund, or from funds furnished for that purpose by the Donor.

[fol. 56] In the event that the Trustee shall request from the Donor written instructions as to the action which it shall take in regard to any of the matters set forth in this paragraph, and the Donor shall neglect or refuse to furnish such instructions for a period of ten (10) days, or in the event that the Donor shall be unable for any reason to furnish such instructions, the Trustee is hereby authorized and empowered to take such action in regard to such matters as it may deem proper and desirable.

The Donor hereby expressly reserves to himself the privilege of increasing the principal of the trust estate, at any time by adding thereto personal property and securities which the Trustee shall receive, hold, manage, sell, invest and reinvest in the same manner as hereinbefore specified in respect of the securities forming part of the original fund.

Fifth. The Trustee may in its sole discretion cause the securities which may from time to time comprise the trust fund, or any part thereof, to be registered in its name as Trustee hereunder, or in its own name, or in the name of

its nominee, or to take and keep the same unregistered, and to retain them or any part thereof, in such condition that they will pass by delivery.

Sixth. The Trustee shall be entitled to receive as compensation for its services in the administration of this trust, a commission of one per cent (1%) per annum upon income, and is hereby authorized to deduct such commission before paying the income to the beneficiary hereunder.
[fol. 57] The Trustee also shall be entitled to a com-ission of one per cent. (1%) upon the market value of the trust fund when and as the trust shall terminate.
The Trustee is also authorized, in the discharge of its duties, to employ counsel and agents and to determine and pay to them reasonable compensation, and it shall be entitled to reimbursement for the same, and for such other expenses and charges as it may deem necessary and proper to incur.

Seventh. The Donor covenants and agrees to make, execute and deliver in due form of law such other and further assignments, conveyances or other instruments as the Trustee may deem requisite or necessary to effectuate the purposes hereof.

Eighth. The Trustee is further authorized and empowered to pay out of the income received from the trust fund any and all taxes which properly may become payable from time to time, under the laws of the United States, or of any State, County or Municipality on said trust property, or for any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws.

Ninth. In case of securities taken or purchased for said trust fund at a premium, the Trustee shall not be bound to set aside any part of the income thereof as a sinking fund to retire or absorb such premium.

[fol. 58] Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the

trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned.

[fol. 59] Eleventh. The Trustee by joining in the execution of this instrument, signifies its acceptance of the trust.

Twelfth. It is mutually agreed that those presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

This instrument is made in duplicate, each of which is an original, but both taken together shall be deemed one and the same instrument.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by a Vice-President, and its corporate seal to be hereunto affixed and attested by an Assistant Secretary as of the day and year first above written.

Wm. H. Porter. (Seal.) Signed, sealed and delivered in the presence of James J. McDermott. Bankers Trust Company, by H. F. Wilson, Jr., Vice-President. Attest: J. E. Godridge.

[fol. 60] STATE OF NEW YORK,
County of New York, ss:

On this 27th day of November, 1926, before me personally came William H. Porter, to me known and known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

James J. McDermott, Notary Public, Bronx Co. No. 25, Reg. No. 2707. Cert. filed in N. Y. Co. No. 253, Reg. No. 7172. Queens Co. 1919 and Westchester Co. Commission expires March 30, 1927.

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of November, 1926, before me personally came H. J. Wilson, Jr., to me known, who being by me duly sworn, did depose and say that he resides at Upper Montclair, New Jersey; that he is a Vice-President of Bankers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

J. W. Keney, Notary Public.

[fol. 61] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed April 8, 1929

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegation contained in the paragraph of the petition numbered 1.

2. Admits the allegations contained in the paragraph of the petition numbered 2.

3. Admits so much of the paragraph of the petition numbered 3, as alleges that the tax in controversy is a deficiency in Federal estate tax on the estate of William H. Porter, deceased, but denies that the amount in dispute is $103,768.22, as alleged in said paragraph numbered 3.

4. Denies that the determination of the deficiency tax is based upon errors as alleged in the paragraph of the petition numbered 4.

[fol. 62] 5. (a), (b), (c), (d), (e), (f), (g), (h) Admits the allegations contained in subparagraphs (a), (b), (c), (d), (e), (f), (g), and (h) of the paragraph of the petition numbered 5.

(i), (j) Denies the allegations contained in subparagraphs (i) and (j) of the paragraph of the petition numbered 5.

(k) Admits the allegations contained in subparagraph (k) of the paragraph of the petition numbered 5.

(l) Denies the allegations contained in subparagraph (l) of the paragraph of the petition numbered 5.

(m), (n), (o), (p), (q), (r) Denies the allegations contained in paragraphs (m), (n), (o), (p), (q), and (r) of the paragraph of the petition numbered 5.

(s), (t) Admits the allegations contained in subparagraphs (s) and (t) of the paragraph of the petition numbered 5.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore it is respectfully prayed that the determination of the Commissioner be approved.

C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: L. S. Pendleton, Special Attorney, Bureau of Internal Revenue.

EGS/lmh-3/26/29.

[fol. 63] Before United States Board of Tax Appeals

[Title omitted]

Amendment to Answer—Filed at hearing Oct. 30, 1930

Comes now the respondent, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for

amendment to his answer filed in the above-entitled appeal alleges as follows.

(1) That in determining the deficiency tax shown in the sixty-day notice, dated December 22, 1928, the Commissioner excluded from the gross estate the value of a transfer in trust made October 18, 1918, in the sum of $107,500, made up of $105,625, corpus, and $1,875, accrued income; that in determining the deficiency as aforesaid the Commissioner excluded from the gross estate the value of a transfer in trust made on June 27, 1919, and not on Feb- [fol. 64] ruary 1, 1919, as stated in the sixty-day notice, in the sum of $108,625, made up of $106,375, corpus, and $2,250, accrued income; that in excluding the value of the corpus of the two trust funds, he erred.

(2) That there should be included in the gross estate of the decedent $105,625, representing the value of the transfer in trust made on October 18, 1918, and $106,375, representing the value of the transfer in trust made on June 27, 1919.

(3) That the said transfers are taxable as a part of the decedent's gross estate under the provisions of Section 302 (d) of the Revenue Act of 1926.

Wherefore it is respectfully prayed that the deficiency be increased in the proper amount.

C. M. Charest, General Counsel, Bureau of Internal Revenue, by L. S. P. Of Counsel: Lewis S. Pendleton, Special Attorney, Bureau of Internal Revenue.

EGS/lmh-10/29/30.

[fol. 65] Before United States Board of Tax Appeals

[Title omitted]

Reply to Amendment to Answer—Filed Nov. 8, 1930

The petitioners in the above entitled proceeding by their attorney, Richard L. Davisson, in reply to the amendment to the answer of the Respondent allege as follows:

(1) Admit so much of Paragraph (1) of the amendment to the answer as alleges that in determining the deficiency tax shown in the sixty day notice dated December 22, 1928,

the Commissioner excluded from the gross estate the value of a transfer in trust made October 18, 1918, in the sum of $107,500. made up of $105,625. corpus, and $1,875. accrued income; that in determining the deficiency as aforesaid the Commissioner excluded from the gross estate the value of a [fol. 66] transfer in trust made on June 27, 1919, and not on February 1, 1919 as stated in the sixty day notice, in the sum of $108,625, made up of $106,375. corpus, and $2,250. accrued income.

(2) Deny so much of Paragraph (1) of the amendment to the answer as alleges that in excluding the value of the corpus of the said two (2) Trusts the Commissioner erred.

(3) Deny the allegation contained in Paragraph (2) of the amendment to the answer.

(4) Deny the allegation contained in Paragraph (3) of the amendment to the answer.

(5) If the deficiency asserted in the original sixty day letter, which is Exhibit A attached to the petition, is sustained and if such deficiency is increased by the amount claimed in the amendment to the answer, the petitioners as Executors of the said Estate will be required to pay a further amount on account of the New York Estate Tax liability of the Estate, namely $32,733.56, in addition to that set forth in sub-paragraph (u) of the petition, as amended. The petitioners will pay to the New York State Tax Commission said additional amount of $32,733.56 before November 30, 1930 on account of said additional New York Estate Tax liability. The petitioners hereby make claim for credit against the Federal Estate Tax liability of said estate, as finally determined, for said additional New York Estate Tax in the sum of $32,733.56.

[fols. 67 & 68] Wherefore petitioners pray that this Board may redetermine the deficiency alleged in accordance with the foregoing.

Dated November 7th, 1930.

Richard L. Davisson, Counsel for Petitioners. Office and Post Office address: 7 Dey Street, New York City.

Duly sworn to by Richard L. Davisson. Jurat omitted in printing.

[fol. 69] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDMENT TO PETITION—Filed Nov. 8, 1930

The petitioners by their attorney, Richard L. Davisson, amend their petition filed in the above entitled appeal as follows:

(1) Amend Paragraph (4) of the petition so as to allege a new sub-paragraph namely, sub-paragraph (d) to read as follows:

"(d) The error of the respondent in not allowing a credit against the Federal Estate Tax liability of the Estate on account of the New York State Tax paid by said Estate to this date, and to be paid within three (3) years from the date of the filing of the Federal Estate Tax Return."

[fol. 70] (2) Amend Paragraph (5) of the petition so as to allege a new sub-paragraph namely, sub-paragraph (u) to read as follows:

"(u) Within three (3) years after the filing of the Federal Estate Tax Return for said Estate, the Executors actually paid to the State of New York, the sum of $833,402.42, which said sum includes the payment of $750,000. referred to in Paragraph (t) hereof, on account of the New York Estate Tax liability of the Estate in respect of property included in the gross estate for Federal Estate Tax purposes and petitioners claimed credit therefor within the said three (3) year period with the respondent herein."

Wherefore petitioners pray that this Board may redetermine the deficiency alleged in accordance with the foregoing.

Dated November 7th, 1930.

Richard L. Davisson, Counsel for Petitioners. Office and Post Office Address: 7 Dey Street, New York City.

[fol. 71] *Duly sworn to by Richard L. Davisson. Jurat omitted in printing.*

[fol. 72] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER TO AMENDMENT TO THE PETITION—Filed Nov. 17, 1930

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the amendment to the petition of the above-named taxpayer, admits and denies as follows:

(d) Denies the allegations of error contained in paragraph (d) of the amendment to the petition.

(u) Admits so much of paragraph (u) of the amendment to the petition as alleges that the petitioners claimed credit in the sum of $833,402.42 within three years of the filing of the Federal estate tax return on account of the New York [fol. 73] estate tax liability of the estate in respect of property included in the gross estate for Federal estate tax purposes, and denies all other allegations contained in said paragraph (u) of the amendment to the petition.

Denies each and every allegation contained in the amendment to the petition not hereinbefore specifically admitted or denied.

Wherefore it is respect-ully prayed that the determination of the Commissioner be approved.

(Signed) C. M. Charest, C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: Lewis S. Pendleton, Special Attorney, Bureau of Internal Revenue.

LSP/lmh-11/15/30.

[fol. 74] 23 B. T. A. —

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 42815

ESTHER JACKSON PORTER, as Executrix and RICHARD L. Davisson, as Surviving Executor of the Estate of William H. Porter, Deceased, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated June 30, 1931

FINDINGS OF FACT AND OPINION

1. Where the settlor of a trust estate reserves to himself alone a power to alter, change or modify the trust, such reservation renders the transfer incomplete until his death. The property is therefore properly included in his gross estate subject to tax under section 302 (d) of the Revenue Act of 1926. This is true even though in the trust agreements, the settlor expressly provided that if there was a revocation of the trust he could not designate himself or his estate as beneficiary.

[fol. 75] 2. Valid claims for balances due on subscriptions made by a father to a hospital and a university for memorials therein to a son killed in the World War are not, under section 303 (a) (1) of the Revenue Act of 1926, claims against the decedent father's estate "contracted bona fide and for an adequate and full consideration in money or money's worth" and are, therefore, not allowable as deductions from his gross estate.

3. New York Estate tax, amounting to $866,135.98, paid in respect to property included properly in the gross estate of the decedent, held, allowable as a credit to petitioners against the Federal estate tax, to the extent it does not exceed the 80 per cent credit provided by section 301 (b) of the Revenue Act of 1926.

Richard L. Davisson, Esq., Henry Mannix, Esq., and E. J. Corcoran, Esq., for the Petitioners.

Lewis S. Pendleton, Esq., for the Respondent.

The respondent determined a deficiency of $103,768.22 in estate tax, due from the estate of William H. Porter, who died a resident of the State of New York on November 30, 1926.

The errors assigned are: (a) the inclusion in the gross estate by respondent of the value of certain property alleged to have been transferred in trust on November 27, [fol. 76] 1926, amounting (less the $5,000 exemption) to $211,125; (b) the refusal of the respondent to allow as proper deductions as debts of the decedent certain amounts paid by the executors on account of pledges signed and obligations incurred by the decedent in favor of certain charitable and educational institutions; (c) the refusal of the respondent to allow full credit for taxes actually paid as state inheritance taxes; and (d) the refusal of the respondent to allow as a credit against the Federal estate tax the amount of the New York estate tax, paid and to be paid by said estate, within three years from the date of the filing of the Federal estate-tax return.

Findings of Fact

The petitioners are the duly qualified and acting executors of the estate of William H. Porter, who died a resident of New York, November 30, 1926.

William H. Porter did, on or about October 18, 1918, transfer to the Bankers Trust Company, a corporation, as trustee under a trust agreement of the date, $100,000, principal amount, City of New York 4½ per cent bonds. This trust, hereinafter referred to as "Trust No. 1," in part provided for the payment of the trust income to the decedent's daughter, Helen Porter Davisson, until she should reach the age of thirty years and, upon her reaching such age, the principal was to be paid to her. In the event of her death before attaining the age of thirty years, the principal [fol. 77] was to be held in trust for the benefit of her son, Richard L. Davisson, Jr., until he reached the age of thirty years, at which time the principal was to be paid to him. Other provisions of this trust, effective on various contingencies, are unimportant in the instant case.

On or about February 1, 1919, the decedent transferred to said Bankers Trust Company, as trustee, under an agreement of that date, $100,000, principal amount, City of New

York 4½ per cent corporate stock. This trust instrument, hereinafter referred to as "Trust No. 2," provided for the payment of the trust income to decedent's daughter, Helen Porter Davisson, until she should reach the age of forty years, and upon her attaining such age, the principal was to be paid to her. In the event of her death before reaching the age of forty years, the principal was to be held in trust for the benefit of her said child, Richard L. Davisson, Jr., until he should reach the age of thirty years, at which time the principal was to be paid to him. Other provisions of this trust are not material in the instant case.

Both said trusts contained the following provision:

Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the [fol. 78] trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest, or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interest of third parties may be concerned.

The trusts were not created in contemplation of death. [fol. 79] At the time of the creation of both the trusts, the decedent's daughter, Helen Porter Davisson, had only one child, Richard L. Davisson, Jr. Between the dates of the creation of the said trusts and November 27, 1926, two more children, Joan Davisson and William Porter Davisson, were born to said Helen Porter Davisson.

In order to provide for the newly-born grandchildren, the decedent determined to exercise the power reserved to him in paragraph "Tenth" of the said two trust deeds and, with this purpose in view, he wrote two letters to the Bankers Trust Company, the latter part of October, 1926, indicating his desire and determination.

On November 27, 1926, three days prior to his death, William H. Porter executed and delivered to the Bankers Trust Company simultaneously three instruments, one of which, addressed to the Bankers Trust Company as trustee, relative to Trust No. 1, provided:

Pursuant to the power reserved by me in the Tenth Article of the above described Deed of Trust, I hereby revoke said Deed and terminate the interests of all persons therein, and I hereby direct you to deliver the principal thereof, all income on such principal accrued but not actually received, and all income thereon received but not yet distributed to the beneficiary, to yourselves as Trustee under a new Deed of Trust dated the same date as this letter and executed by me in favor of said Helen Porter [fol. 80] Davisson and other beneficiaries, such principal to be held by you as principal of the new trust and such income, whether accrued or received, to be treated by you as you would have treated that income under the trust which I now revoke.

Very truly yours, (Signed) Wm. H. Porter. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of November, 1926, before me personally came William H. Porter, to me known to be the individual described in and who executed the foregoing Revocation and acknowledged to me that he executed the same.

(Signed) James J. McDermott.

Another instrument of the same character, so executed and delivered, related to Trust No. 2. Thereupon the said

William H. Porter executed a new trust agreement conveying to the Banker's Trust Company as trustee the same securities as had theretofore been conveyed to the Banker's Trust Company as trustee in Trusts Nos. 1 and 2, already described in our findings of fact. This new trust agreement, executed November 27, 1926, contained similar minute [fol. 81] instructions to the trustee as to the management of the funds entrusted to its care, disposition of income, investing and reinvesting the principal, and other like instructions, as was contained in Trusts Nos. 1 and 2. This trust agreement provided in part that Helen Porter Davisson should receive the income therefrom until she attained the age of forty years, at which time she was to receive the principal. In the event of her death before reaching that age, the principal was to be held in trust for the benefit of her surviving children and the issue of any deceased child per stirpes and not per capita, upon terms and conditions stated in the trust indenture.

This new trust agreement contained the same paragraph ten as was contained in Trusts Nos. 1 and 2, which has already been set out in full in these findings of fact.

The respondent included in decedent's gross estate the sum of $211,125 as representing the value, on the date of decedent's death, of the securities described in Trust No. 3 of November 27, 1926. It was alleged in the petition and admitted by respondent in his answer that at the date decedent executed Trust No. 3, to wit, November 27, 1926, neither the decedent nor his physicians nor his family had any anticipation or expectation that his death would occur soon thereafter, and there was no reason to believe or anticipate that the decedent did not have many years of life ahead of him. From this we find that the decedent did not execute Trust No. 3 in contemplation of death.

[fol. 82] On or about October 18, 1918, decedent transferred to Bankers Trust Company, as trustee, under trust indenture of that date, $100,000, principal amount, City of New York 4½ per cent. bonds. Under the terms of the trust, hereinafter referred to as Jamie Porter Trust No. 1, the income was directed to be paid to the decedent's son, James J. Porter, until he reached the age of thirty years, and thereupon to pay over the principal to him. In the event of the death of James J. Porter before attaining the

age of thirty years, the trust was to continue for the benefit of his daughter, the decedent's grandchild, Jane Hetherington Porter, also known as Jamie Porter.

On or about June 27, 1919, the decedent transferred to Bankers Trust Company, as trustee, under trust indenture of such date, $100,000, principal amount, City of New York 4½ per cent. corporate stock. Under the terms of the trust, hereinafter referred to as Jamie Porter Trust No. 2, the income was to be accumulated during the minority of the decedent's grandchild, Jane Hetherington Porter (Jamie Porter), and thereafter paid to her until she attained the age of thirty-five years, at which time the principal was to be paid to her. In the event of her death before she attained the age of thirty-five years, the trustee was directed to transfer and pay over the principal of the fund in equal shares to the children of said Jane Hetherington Porter and in default of children surviving, then to Helen Porter Davisson, daughter of the donor, and in case of her prior death, in equal shares to the children of said Helen [fol. 83] Porter Davisson then living.

The same provisions by which the decedent reserved the right and power to modify or alter the Helen Porter Davisson Trusts Nos. 1, 2 and 3 are contained in the Jamie Porter Trusts Nos. 1 and 2.

At the date of the decedent's death, November 30, 1926, the value of the securities held under Helen Porter Davisson Trust No. 3 was $211,125 and the value of the securities held under Jamie Porter Trust No. 1 was $105,625, and under the Jamie Porter Trust No. 2 was $106,375.

On May 12, 1927, payment was made by the executors of decedent to the treasurer of the New North Country Community Hospital of Glen Cove, Long Island, of the sum of $6,000, being the balance of a written subscription or pledge of $12,000 made by decedent during his lifetime to said hospital. This subscription was made by decedent for the specific purpose of equipping an X-ray room in the hospital as a memorial to his son, who lost his life in the World War. During the decedent's lifetime, the construction of the hospital was undertaken and an X-ray room was provided therein in reliance on said promise of decedent.

On May 12, 1927, the executors of decedent's estate paid to Princeton University, Princeton, N. J., the sum of $5,000

as the balance of a subscription of $25,000 made by the decedent during his lifetime for the purpose of erecting in the University Chapel a bay, containing a memorial window in memory of decedent's son who lost his life in the [fol. 84] World War. Princeton University, relying on decedent's said subscription, had prior to decedent's death contracted for and commenced construction of such bay and window.

The respondent disallowed the deductions claimed by petitioners on account of said subscriptions and payments.

The petitioners, at the hearing, withdrew their claim for deductions on account of other subscriptions or pledges, aggregating $2,205, made to Boy Scouts of Nassau County, Hampton Tuskegee Endowment Fund, Nassau Hospital Association, and Civic Forum of New York City, claimed in their petition.

Respondent's deficiency notice shows he allowed as a credit for State inheritance taxes, paid by petitioners, the sum of $226,815.16. Said notice should have stated the amount to be $226,855.16.

Within three years of the filing of petitioners' return they paid and claimed credit for $866,135.98, paid on account of New York estate tax on decedent's estate. On May 26, 1927, $300,000 was paid; on May 25, 1928, $450,000; on October 25, 1930, $83,402.42; and on November 12, 1930, $32,733.56. The total, $866,135.98, respondent has not allowed. Of such total $833,402.42 was paid with respect to property included by the respondent as part of decedent's gross estate and $32,733.56 with respect to the value of the property included in the Jamie Porter Trusts Nos. 1 and 2, which the respondent alleged in his amended answer should be included as a part of decedent's gross estate, which assertion petitioners deny.

[fol. 85] OPINION

BLACK:

The petitioners contend that the trust herein referred to as Trust No. 3, dated November 27, 1926, did not create any new trust nor revoke trusts designated herein as Trusts Nos. 1 and 2, and that, if it had any legal effect, it was merely to modify Trusts Nos. 1 and 2.

They further contend that if a new trust was created on November 27, 1926, by Trust No. 3, section 302 (c) is unconstitutional in so far as it provides that transfers made within two years prior to death shall be deemed to have been made in contemplation of death.

They insist that the pledges made by the decedent to the New North Country Community Hospital and Princeton University are proper deductions as claims against the estate under section 303 (a) (1) of the Revenue Act of 1926, or under section 303 (a) (3) of said act, as transfers to or for the use of corporations organized and operated exclusively for charitable and educational purposes, and they claim full credit for the amount paid on account of New York estate tax.

The respondent disputes all the above contentions made by petitioners and insists that the property held by the Bankers Trust Company as trustee under Trust No. 3 was transferred by the decedent to said company after the enactment of the Revenue Act of 1926, without consideration, and within two years of the decedent's death. The respondent further insists that Trust No. 3 falls within [fol. 86] the provisions of said section 302 (c) and that the transfer of the property held in trust must be deemed and held to have been made in contemplation of death within the meaning of the Act.

In view of the fact that all the trust agreements including the one executed November 27, 1926, referred to as Trust No. 3, contained paragraph "Tenth," which has been set out in full in our findings of fact, and in view of the further fact that we think said paragraph "Tenth" in these trust agreements brings them within the provisions of section 302 (d) of the Revenue Act of 1926, we do not find it necessary to decide whether or not respondent correctly included the property described in Trust No. 3 as a part of decedent's estate under section 302 (c), nor do we find it necessary to pass upon petitioners' assignment of error that section 302(c) is unconstitutional.

The respondent also insists that if the legal effect of Trust No. 3 was merely to modify or amend Trusts Nos. 1 and 2 and did not operate to effect a transfer of any property rights over which the decedent had the power of disposition, the entire value of the property held under Trusts Nos. 1 and 2, as amended by Trust No. 3, constituted

a part of decedent's gross estate under the provisions of section 302 (d).

The respondent further contends that the entire value of the property held under the Jamie Porter Trusts Nos. 1 and 2 should be included as a part of the decedent's gross estate under Section 302 (d) of the Revenue Act of 1926. Section 302 (d) and (h) of the Revenue Act of 1926, read:

[fol. 87] (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f) and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

By reading paragraph "Tenth" which was a part of each of the trust instruments involved in the instant case, it will be seen that the settlor reserved the right to himself to modify or alter the indentures. The only restrictions placed on this power was that the donor could not make himself or his estate the beneficiary. Outside of this limitation his power to alter or modify was unlimited. He went so far as to say in said paragraph:

"Tenth". "*No one, born or unborn, shall have any right,* [fol. 88] *interest, or estate under this indenture except subject to the proper modification or alteration thereof.*"

And this power to alter or modify existed right up to the day of his death. It was again reserved by him in the trust agreement No. 3, which he executed three days before

his death, November 27, 1926. It was a power outstanding when he died and only death extinguished it. Up until the very day of his death he might have completely changed the beneficiaries of the trusts. Their estates were only made secure when the hand of death extinguished the power.

May v. Heiner, 281 U. S. 238, and the group of cases following it, cited by counsel for petitioner in their brief, it seems to us, have no application. Said cases concern a situation where the grantor of property in a deed or the settlor of a trust has made an irrevocable conveyance of the property or revocable only by and with the consent of adverse interests, subject only to a reservation to himself of a life estate. What the Supreme Court held in May v. Heiner, supra, and the group of cases following it, was that where there has been an irrevocable conveyance of the property with a reservation of the life estate to the grantor, nothing passes by his death when the life estate is extinguished. The title had already passed by the prior conveyance. It was to cure the effect of the decision of May v. Heiner, supra, that Congress on May 3, 1931, adopted a Joint Resolution amending Section 302 (c) of the Act of 1926, but this Section 302 (c), as amended by the Joint Resolution of May 3, 1931, has nothing whatever [fol. 89] to do with Section 302 (d), as we view it. In the instant case the donor had not made an irrevocable conveyance of the property to the trustee reserving a life estate to himself, but, on the contrary, had expressly reserved to himself the right to alter and amend and modify the trust agreements.

We think that even without Section 302 (d) of the 1926 Act, under the principles of Reinecke v. Northern Trust Company, 278 U. S. 339, and Chase National Bank v. United States, 278 U. S. 327, the property conveyed by the trusts in the instant case should be included as a part of decedent's estate. But, if there should be any doubt about that, it seems to us it has been removed by Congress in the enactment of Section 302 (d) of the Revenue Act of 1926. Reinecke v. Northern Trust Company, supra, and Chase National Bank v. United States, supra, construed Acts prior to the Revenue Act of 1926, and which acts did not contain any Section 302 (d) (h). It seems to us that the aim of Congress, in inserting the provisions of subparagraph (d) of Section 302, was to prevent an avoidance

in whole or in part of the estate tax by a method of disposition which would enable the owner of property so long as he lived to control the future benefits and disposition of property as effectually as by will, and the provision under review is an adjunct of the general scheme of taxation of which it is a part entirely appropriate as a means to that end.

It therefore seems clear that under the plain language of Section 302 (d) of the Revenue Act of 1926, all the prop- [fol. 90] erty conveyed by the trust instruments involved in the instant case must be included as a part of decedent's estate unless that clause in paragraph "Tenth" of the trust instruments, wherein the donor provided that in any alteration or modification of the trust instruments, he could not designate himself or his estate as the beneficiary, takes it out of the purview of the Statute. We have, however, already decided that question adversely to petitioner in Loring A. Cover, et al., 17 B. T. A. 1177 and Bank of New York & Trust Company, 20 B. T. A. 677. And if not in those two cases, certainly we have decided it adversely to petitioner in Estate of George R. Cook, 23 B. T. A. 335.

Counsel for petitioner cite in support of their contention Brady v. Ham, 45 Fed. (2d) 454. It must be admitted that that decision does support petitioner's position, but, as we endeavor to point out in Estate of George R. Cook, supra; Brady v. Ham, supra, is contrary to what we conceive to be the plain language of the statute and the decisions of the Supreme Court in Reinecke v. Northern Trust Co., supra, and Chase National Bank v. United States, supra. It seems to us that the discussion in Brady v. Ham, supra, about the failure of the donor of the trust to reserve the right to confer upon himself or his estate the economic benefits of the property, is irrelevant. The estate tax levied by the Federal Government is a transfer tax.

In a case where the settlor of a trust has reserved the right to alter, modify or revoke the trust, substantial rights [fol. 91] pass by reason of his death. Up to the very moment of his death, he has the right to exercise that power and the beneficiary of the trust may be ousted by the exercise of it. When the settlor dies that power is gone and that which up to that time was an insecure estate ripens into one which is completely vested. It is this transfer

completed by death which the statute taxes and we think that the mere fact that the settlor has no power to make himself or his own estate the beneficiary has nothing to do with it.

On authority of Reinecke v. Northern Trust Company, supra; Chase National Bank v. United States, supra; Loring A. Cover, et al., supra; Bank of New York and Trust Company, supra; and Estate of George R. Cook, supra; we hold that the value of the property at the time of decedent's death, included in said trusts, should be included as a part of decedent's gross estate.

The claims for balances due from the decedent on subscriptions to the New North Country Hospital and to Princeton University for memorials therein, as set forth in our Findings of Fact, were valid and enforceable against decedent's executors. See in re Taylor's Estate, 251 N. Y. 257, 167 N. E. 434; Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173; Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325, 25 R. C. L. 1408.

In the case of Jeptha H. Wade, Jr., et al., Executors, 21 B. T. A. 339, relied on by petitioners, we held that the consideration for the pledges was the payment by others of large amounts of money to the same institutions and that the consideration for each pledge was adequate and [fol. 92] full and in money or money's worth, within the meaning of Section 303 (a) (1) of the Revenue Act of 1926.

In the instant case we have no such situation before us. In the absence of proof of the adequate and full value in money or money's worth of the memorials erected or contracted for, the claims for balance of decedent's subscriptions paid by the executors may not be allowed as a deduction from decedent's gross estate. Georgianna M. Romberger, et al., Executors, 21 B. T. A. 193.

Petitioners further contend that, "If for any reason it should be determined that these pledges were not deductible as 'claims against the estate' under Section 303 (a) (1), they were proper deductions as 'transfers to charitable and educational corporations' under Section 303 (a) (3)."

Section 303 (a) (3) reads:

The amount of all bequests, legacies, devices, or transfers, to or for the use of the United States, any State, Ter-

ritory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or [fol. 93] trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate; * * *

In order for a transfer which has been made to a charitable or educational corporation to be deductible from the gross estate it must be proved that such institutions are operated exclusively for charitable or educational purposes and that no part of their net earnings inure to the benefit of any private stockholder or individual.

So, even though the amounts claimed by petitioners as a deduction under Section 303(a) (3) come within the general provisions of that sub-paragraph (a matter which we do not now decide), we could not allow these amounts because we have no proof before us showing that the New North Country Community Hospital is operated exclusively for charitable purposes nor that Princeton University is operated exclusively for educational purposes and we have no proof showing that no part of the net earnings of these institutions inure to the benefit of any private stockholder or individual. This being the state of the evidence, peti- [fol. 94] tioners' contention that these amounts be deducted from decedent's gross estate under the provisions of Section 303 (a) (3) is denied. Edward C. Moore, Jr., et al., Executors, 21 B. T. A. 279; Bronnan v. Cabanno M. E. Church, 192 S. W. 982; Frohlinger v. Richardson, 218 Pac. 497.

The evidence shows that the petitioners have paid New York estate tax in the amount of $866,135.98 in addition to all other State estate and inheritance taxes which have been allowed as credits by the respondent, and that claims for the credit of such New York estate-tax payments were filed with the respondent within three years after the filing of the Federal estate tax-return. The sum of $833,402.42 of the above amount was paid with respect to property included by the respondent as a part of the decedent's gross estate and $32,733.56 with respect to property which was not so included but which respondent in his amended answer alleged should be so included.

The petitioners having paid the sum of $866,135.98 on account of the New York estate tax, in respect to property which we hold should be included in the gross estate of the decedent, are entitled, and we so adjudge, to full credit of same against the Federal estate tax determined in accordance with this opinion, to the extent it does not exceed the 80 per cent. credit provided by Section 301 (b) of the Act.

Reviewed by the Board.

Decision will be entered under Rule 50.

[fol. 95] DISSENTING OPINION

SEAWALL, dissenting:

I feel constrained to dissent from so much of the opinion of the Board as holds that the property embraced in the trusts mentioned should be included in the gross estate of the decedent.

The law here being applied provides for an estate tax on transfers of the net property of a decedent at the time of his death. (Section 301 of the Revenue Act of 1926.) The tax is not a succession tax, payable by the beneficiary, but a transfer tax payable at the hands of the personal representative of the deceased. (Sections 305 [a] and 314 [b].) The deceased did not own the property here sought to be included in his gross estate at the time of his death. He had conveyed it away by trust deeds without power to revest it in himself or in his estate.

In neither Trust No. 1, Trust No. 2, nor Trust No. 3 did the decedent reserve the power to revoke the trusts. The

reservations were merely of the power to modify or alter; not to revoke. The power so reserved was limited to modifications or alterations not in favor of himself or his estate, but were to apply only so far as the interests of third parties were concerned.

The decedent, in the instruments of November 27, 1926, reciting revocation of the trusts, did not purport to act by virtue of any other right or power except that contained in paragraph "Tenth" set forth in the findings of fact. A new trust was not created; the funds did not change hands; other grandchildren, subsequently born, were merely provided for.

[fol. 96] Under the New York rule, which is here applicable, the donor of a trust alone cannot revoke the trust unless the power of revocation is expressly reserved. Cazzani v. Title Guarantee & Trust Co., 175 App. Div. 369, affd. 220 N. Y. 683, 116 N. E. 1040; Title Guarantee & Trust Company v. Hoven, 214 N. Y. 468, 108 N. E. 819; In re Carnegie's Estate, 203 App. Div. 91, 196 N. Y. Supp. 502, affd. 236 N. Y. 517, 142 N. E. 266.

Where no power of revocation is reserved, attempts by the donor to revoke are void. Garner v. Germania Life Insurance Co., 110 N. Y. 266, 18 N. E. 130; Roberts v. Taylor, et al., 300 Fed. 257; McPherson v. Rollins, 107 N. Y. 316, 14 N. E. 411; Dickey v. Goldsmith, 60 Misc. 258, 111 N. Y. Supp. 1025.

The trusts could not be revoked by the donor, one of the beneficiaries being a minor. Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454.

At the time of the execution of the trusts in question, all economic benefits in the trust funds passed from the decedent, without any right or power reserved to revoke such trusts or to repossess any part or interest in the funds.

In cases decided by the United States Supreme Court and relied on by the respondent, where property has been included in the gross estate for Federal estate-tax purposes, the decedent had a legal right, direct or contingent, under which he, to the moment of his death, might acquire some economic benefits in the property concerned. In Tyler v. United States, 281 U. S. 497, the decedent shared with his [fol. 97] wife the ownership and enjoyment of the property during his life and if the decedent had survived his spouse, he would have acquired the whole property. At his death

there was a shifting of economic benefits from him to his wife.

In the case of Chase National Bank, et al. v. United States, 278 U. S. 327, the decedent, by virtue of the power to change beneficiaries, could make the insurance policies payable to his estate for estate purposes, securing the cash surrender value of the policies, or borrow against the policies.

In Reinecke v. Northern Trust Co., 278 U. S. 339, the donor could revest in himself the principal of the trust.

The Supreme Court has refused to include in decedent's gross estate property no interest in which passed from the decedent at death. May, et al. v. Heiner, 281 U. S. 238; Reinecke v. Northern Trust Co., supra; and Nichols v. Coolidge, 274 U. S. 531.

Upon the hearing and in respondent's brief, only slight contention was or is made that the trust funds should be included in the gross estate, by reason of section 302 (c) of the statute. Petitioner directly challenged the constitutionality of this section under the decision of the Supreme Court in Schlesinger v. Wisconsin, 270 U. S. 230. The evidence shows clearly that the instruments of November 27, 1926, were not made in contemplation of death. Respondent placed his principal reliance on section 302 (d) which provides that there shall be included in the gross estate of [fol. 98] every decedent at the time of his death all property:

"To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, *where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke* * * *"

In the trust deeds involved here, power to amend and alter was reserved to the donor—the decedent—but this was not a general power, but a limited power as set out in the facts recited in the main opinion. Under the express limitation of the power, the decedent could not exercise it by deed or will, or otherw[illegible] in favor of himself or his estate. The possessor of a general power of appointment has authority to dispose of the property at his death by will and his position is not unlike that of an owner, for he can

make himself during life and his estate thereafter the beneficiary of the trust. An unlimited power to amend, alter or revoke a deed of trust is equivalent to a general power of disposition and a general power of disposition is the practical equivalent of a fee. Bullen v. Wisconsin, 240 U. S. 625; Lesser v. Burnet, 46 Fed. (2d) 756; Sugden, Powers, 8th Fed., 396.

The failure to exercise this general power of appointment, in effect, results in a transfer from the donee's own estate (to which he has the power to give it) and a transfer to the estate of others who take because of his death and the failure to exercise the power during life in his own favor or in the favor of others. Property passing under [fol. 99] such general power of appointment may be subject in the hands of the donee of the power to the claims of his creditors (United States v. Fields, 255 U. S. 257); or to the claims of trustees in bankruptcy (Cohen v. Samuels, 245 U. S. 50); and may be included in the estate of the decedent for estate-tax purposes (Chase National Bank, et al. v. United States, supra). But under a special, naked or limited power of appointment, such as is here under consideration, the decedent could not have sold or assigned the power (Jones v. Clifton, 101 U. S. 225). A failure to exercise such limited power can not result in any transfer of anything from the decedent, for there is no beneficial interest or estate in him to be transferred; his creditors have no claim upon his power of appointment nor can they levy execution or distraint against him while he lives, on such account, nor against his estate when he is dead; if he should become a bankrupt, no trustee in bankruptcy would have any claim against the trust funds; his interest in the trust fund being only such limited power of appointment, his estate possesses nothing of value in it to be included in the gross estate. Certainly, "to the extent of his interest therein" would not include the whole value of the property. Reinecke v. Northern Trust Co., supra; Nichols v. Coolidge, supra; May, et al. v. Heiner, supra. The Circuit Court of Appeals for the First Circuit, in the case of Brady v. Ham, 45 Fed. (2d) 454, had under consideration a trust identical with the trusts here involved, except the [fol. 100] power to change and alter the trust and to name any other beneficiaries was limited in that case to beneficiaries other than the maker of the trust; whereas in the

case before us the limitation of the power applies not only to the maker of the trusts, but his estate also. In the Brady v. Ham case, the court, by unanimous opinion, said that the decedent had expressly deprived herself of all economic benefits in the trust estate; that those benefits passed at the time of the execution of the declaration of trust, and such estate was not includable in the gross estate of the decedent, and that "To hold that such property was subject to a transfer tax would amount to what the Supreme Court had termed * * * an arbitrary and capricious exercise of legislature power".

Moreover, it is suggested that the part of section 302 (d) added by the Revenue Acts of 1924 and 1926, and which is underscored in the above quotation, is ambiguous and susceptible of different interpretations and meanings. Do the words "any change" mean (1) a change however slight, or (2) a change without limitation? Webster defines the word "any" to mean "Unlimited, and indefinite number, quantity or degree", as well as "some". Does the statute mean power to make some slight change, or unlimited power to make any change? One of the trusts herein provides that when Mrs. Davisson reaches the age of 30 years, the principal fund shall be paid to her. By way of illustration, if the sole power reserved had been to change the 30 years to 40 years, would that sole reserved power subject the trust funds to be included in the gross estate of the deced [fol. 101] ent at the time of his death? If the power to postpone to the beneficiary the enjoyment of the principal fund for ten years is power sufficient to make such change in the trust as will require the fund to be included in the decedent's gross estate, would not the power to postpone such enjoyment five years or one year or one month have the same effect? If "any change" means any slight change, even a power to cause a day's postponement, under the construction contended for, would seem to comply with the provisions of the statute. Such construction, it appears to me, would contain some of the elements of capriciousness condemned in several adjudicated cases. I prefer to think, as was held by the Circuit Court of Appeals for the First Circuit (White v. Erskine, et al., 47 Fed. (2d) 1914), that congress did not intend by section 302 (d), to create a new form of excise tax, that is, a tax on the power in the grantor to alter or amend a trust executed by him when the power

so reserved is limited as in this case. Cf. Frew v. Bowers, 12 Fed. (2d) 625. To hold under the statute that W. H. Porter's estate should be taxed on the value of the property theretofore conveyed in trust, irrevocably, by him, and not owned by him, in whole or in part, and of which no beneficial interest remained in him, at the time of his death, is to raise a serious doubt as to the constitutionality of the Act of Congress. To hold that by the power to make "any change" in the trust, Congress in the statute meant an unlimited power, to make "any change", or a power to make [fol. 102] a change, such as would leave with the settlor power to revest the property in himself, is to adopt a more reasonable construction and to avoid the doubt as to the constitutionality of the Act. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score". Panama R. R. Co. v. Johnson, 264 U. S. 375.

Smith agrees with this dissent.

DISSENTING OPINION

MATTHEWS, dissenting:

I dissent from the majority opinion in so far as it relates to the trusts. All the trusts in question (except the so-called Trust No. 3) were executed while the Revenue Act of 1918 was in force and none of the trusts was made in contemplation of death. The 1918 Act had no counterpart of subdivisions (d) and (h) of section 302 of the Revenue Act of 1926. The shifting in the economic interest in the trust property was complete as soon as the trusts were made. The donor parted with the legal title and all beneficial interest. He reserved no power to revoke the trusts, by which he could recall the trust property. The power reserved was to alter or amend in any manner in so far as the interests of third parties were concerned, but not in such manner as to be in his own favor or in favor of his estate. The alteration or amendment of Trusts Nos. 1 and 2 by the instrument designated Trust No. 3 did not have the effect of revesting the property in the donor and the re-[fol. 103] transfer of such property to the trustees. It was not, therefore, equivalent to the creation of a new trust.

It seems to me that these trusts are in all material respects similar to the five trusts which in Reinecke v. Northern Trust Co. were held not to be subject to the tax imposed by reason of the provisions of sections 401 and 402 (c) of the Revenue Act of 1921. Section 402 (c) of the Revenue Act of 1921 is identical to the same section of the Revenue Act of 1918. The trusts were not made in contemplation of death; the donor had divested himself of all economic interest in the trust property at the time he created the trusts; the power to alter or amend was not broad enough to revest in him or his estate any interest in the property, and there was no provision in the estate-tax act then in force taxing transfers in trust not made in contemplation of death, where the power to alter or amend is reserved. As Mr. Justice Stone said in Reinecke v. Northern Trust Co., 278 U. S. 339:

* * * The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax.

[fol. 104] See also May v. Heiner, 281 U. S. 238. As the transfers were nontaxable when made, they can not be subjected to tax by a later estate-tax act. They are in the same class as trusts made in contemplation of death before the 1916 estate-tax act was passed, by persons who died subsequent thereto, and with gifts made in 1924 before the gift tax act was enacted. The Supreme Court has held that such trusts and gifts cannot be subjected to the tax. See Schwab v. Doyle, 258 U. S. 529; Nichols v. Coolidge, 274 U. S. 531; Blodgett v. Holden, 275 U. S. 142, 276 U. S. 594, and Untermeyer v. Anderson, 276 U. S. 440. I think the transfers by the trusts here in question are not subject to the tax imposed by sections 301 and 302 (d) and (h) of the Revenue Act of 1926.

A True Copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 105] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 42815

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Estate of William H. Porter, Deceased, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER OF FINAL DETERMINATION

On July 25, 1931, the respondent filed in this proceeding his computation of the deficiency in estate tax due from the above entitled petitioners, under the Opinion and Findings of Fact promulgated by the Board in this proceeding on June 30, 1931. Such computation was set for hearing under Rule 50 on July 29, 1931. The proceeding having been called for hearing at that time and the petitioner not having contested the computation filed by the respondent; the Board having examined said computation and finding it in accord with the aforesaid Opinion and Findings of Fact promulgated on June 30, 1931, it is

[fol. 106] Ordered and decided, that there is a deficiency in estate tax due by the petitioners in this proceeding in the amount of $10,676.35.

Enter.

(Signed) Charles P. Smith, Member United States Board of Tax Appeals.

Entered Jul. 30, 1931.

A True Copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

[fol. 107] NOTICE OF FILING PETITION FOR REVIEW—Filed Jan. 22, 1932

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

To David Burnet, Esq., Commissioner of Internal Revenue:

You are hereby notified that the above named petitioners did, on the 22nd day of January, 1932, file with the Clerk

of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision [fol. 108] of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22nd day of January, 1932.

Edward N. Perkins, Counsel for Petitioner on Review. Mailing address: 15 Broad Street, New York, N. Y.

Service of a copy of the foregoing is hereby acknowledged this 22nd day of January, 1932.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[fol. 109] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION FOR REVIEW—Filed Jan. 22, 1932

Petition of Taxpayer for Review by the United States Circuit Court of Appeals for the Second Circuit of a Decision by the United States Board of Tax Appeals—Filed ——— —, ———

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Taxpayers, the petitioners, in this cause, by their counsel, hereby file their petition for a review by the United States Circuit Court of Appeals for the Second Circuit of [fol. 110] the decision by the United States Board of Tax Appeals rendered on July 30, 1931 (23 B. T. A. 1016), determining a deficiency in Federal Estate tax due by the Petitioners in this proceeding in the amount of $10,676.35, and respectfully show:

I

The Petitioner on Review, Esther Jackson Porter, is an inhabitant of Nassau County, State of New York, and of

the Judicial Circuit of the United States Circuit Court of Appeals for the Second Circuit. The Petitioner on Review, Richard L. Davisson is an inhabitant of the Borough of Manhattan, City and State of New York, and of the said Judicial Circuit. Petitioners on Review are the duly qualified and acting Executors of the Last Will and Testament of William H. Porter, deceased, who died a resident of the State of New York on November 30, 1926. Respondent on Review is the duly authorized and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The return was made and tax paid in the Second District of New York in the Second Circuit.

II

Nature of the Controversy

The controversy involves the proper determination of the petitioners' liability for Federal Estate Tax.
[fol. 111] The material facts, so far as this Petition for Review is concerned, are as follows:

The Trusts

On October 18, 1918, the decedent transferred certain securities of the principal amount of $100,000 to the Bankers Trust Company as Trustee under a written agreement (referred to in the petition and in the opinion of the Board as "Trust No. 1") which provided that the Bankers Trust Company was to collect the income from said securities and to pay over the same to Helen Porter Davisson, a daughter of the decedent, until she should attain the age of thirty (30) years at which time the Trust was to terminate and the principal was to be paid over to said Helen Porter Davisson with remainders over. Said agreement reserved to the grantor the power to modify or alter the same as follows:

"Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate, (so as

to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and in- [fol. 112] terest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned."

On February 1, 1919, the decedent transferred certain securities of the principal amount of $100,000 to Bankers Trust Company as Trustee under a written agreement (referred to in the petition and in the Opinion of the Board as "Trust No. 2") which provided that the Trustee was to collect the income therefrom and pay the same to Helen Porter Davisson until she attain the age of forty years [fol. 113] at which time the Trust was to terminate and the principal was to be paid over to said Helen Porter Davisson with remainders over. Article Tenth of this agreement was exactly similar to Article Tenth above quoted.

At the time of the creation of Trust No. 1 and Trust No. 2, Helen Porter Davisson, the principal beneficiary of both of said trusts, had only one child, namely, Richard L. Davisson, Jr., and both of said trusts provided that, in the event of the death of Helen Porter Davisson prior to the termination of the Trusts, Richard L. Davisson, Jr., should be the beneficiary of them. Subsequently to the creation

of Trust No. 1 and Trust No. 2, two more children were born to Helen Porter Davisson, namely, Joan Davisson and William Porter Davisson. The petitioners, in their petition to the Board of Tax Appeals, alleged, and the Board of Tax Appeals determined in its findings of fact that the decedent determined to exercise the power to modify or alter reserved to him under Paragraph Tenth of Trust No. 1 and Trust No. 2 in order to provide, that in case of the death of Helen Porter Davisson before the termination of said Trust- No. 1 and No. 2 all of her children should share equally in the Trusts, and with this purpose, on November 27, 1926, decedent executed three instruments. One of these instruments is referred to in the Opinion of the Board as "Trust No. 3" and purports to create a Trust with the Bankers Trust Company, as Trustee, the principal of which was composed of the identical property which had been transferred to said Bankers [fol. 114] Trust Company under Trust No. 1 and Trust No. 2 more than seven years before and this property had been held continuously by Bankers Trust Company, as Trustee, under Trust No. 1 and Trust No. 2 until the date of the so-called Trust No. 3.

The beneficiary of Trust No. 3 was Helen Porter Davisson (being the same beneficiary named in Trust No. 1 and Trust No. 2) until she attain the age of forty (40) years at which time the trust was to terminate. One of these instruments purported to revoke Trust No. 1 and directed Bankers Trust Company to transfer the corpus thereof to Trust No. 3. Another instrument purported to revoke Trust No. 2 and directed Bankers Trust Company to transfer the corpus thereof to Trust No. 3.

The so-called Trust No. 3 provided that, in the event of the death of Helen Porter Davisson, prior to the termination thereof, the principal was to be held in trust for the benefit of all her surviving children, and the issue of any deceased child, per stirpes and not per capita, upon the terms and conditions set forth in said instrument, instead of for the benefit of Richard L. Davisson, Jr., alone as provided in Trusts No. 1 and No. 2.

With respect to Trust No. 3, the Respondent determined that "the trust created November 27, 1926, is under Section 302-C of the Revenue Act of 1926 part of decedent's estate for estate tax purposes and no adjustment is war-

ranted in the tentative determination except the allowance of an exemption of $5,000 in the value determined for the [fol. 115] trust property. The value of this trust is therefore $211,125." Section 302-C refers to transfers in contemplation of death.

The petition of the taxpayer to the Board of Tax Appeals contended that the instrument dated November 27, 1926, Trust No. 3, did not constitute a new trust but was merely a modification of Trust No. 1 and Trust No. 2. The Board in its opinion did not decide this issue.

The petition of the taxpayer to the Board of Tax Appeals to review the determination of the Respondent alleges that neither Trust No. 3 nor Trust No. 1 nor Trust No. 2 were made in contemplation of death and the answer filed by General Counsel for Respondent with the Board expressly admits these allegations. In its Findings of Fact, the Board determined that neither Trust No. 1, nor Trust No. 2, nor Trust No. 3 were in fact created in contemplation of death, but the Board, in its opinion, did not decide whether or not the Respondent correctly included the property described in Trust No. 3 as part of the gross estate of the decedent under Section 302-C.

On October 18, 1918, the decedent transferred to the Bankers Trust Company as Trustee bonds in the principal amount of $100,000 under a written agreement referred to in the opinion of the Board as Jamie Porter Trust No. 1, which provided that the income therefrom shall be paid to James J. Porter, the son of the decedent until he attained the age of thirty (30) years. In the event of the death of said James J. Porter before attaining the age of thirty [fol. 116] (30) years, the Trustee was directed to pay the income therefrom to Jane Hetherington Porter, also called "Jamie Porter" until she attained the age of thirty years, at which time the Trust was to terminate. James J. Porter died before attaining the age of thirty (30) years. This agreement contained an article exactly similar to Article Tenth above quoted.

On June 27, 1919, decedent transferred to Bankers Trust Company as Trustee bonds in the principal amount of $100,000 under a written agreement, referred to in the Opinion of the Board as Jamie Porter Trust No. 2, which provided that the income therefrom be accumulated for the benefit of Jane Hetherington Porter during her minority

after which time, the Trustee was directed to pay the income to said Jane Hetherington Porter until she attained the age of thirty-five (35) years at which time the Trust was to terminate. Said agreement contained an article exactly similar to Article Tenth above quoted.

The General Counsel alleged in his Amendment to the Answer that the corpus held under Jamie Porter Trust No. 1, having a value of $105,625, and Jamie Porter Trust No. 2, having a value of $106,375, should be included in the decedent's gross estate for Federal Estate Tax purposes under the provisions of Section 302(d) of the Revenue Act of 1926. This section refers to transfers where decedent reserves a power to alter, amend or revoke.

The petition of the taxpayer and the Reply of the taxpayer to the Amendment to the Answer filed with the Board alleges that none of the property transferred under [fol. 117] any of the above trusts should be included in the gross estate of the decedent for Federal Estate Tax purposes, under Section 302(*d*) of the Revenue Act of 1926, by reason of the power reserved to the decedent to modify or alter, as set forth in Article Tenth above quoted.

The Board included the corpus of all the above mentioned trusts in the gross estate of the decedent for Federal Estate tax, under Section 302 (d) of the Revenue Act of 1926, because of the power to modify or alter, reserved to the grantor in Article Tenth of each of said instruments.

Deductions Claimed

The Board held that a payment by the Executors to the New North Country Community Hospital of Glen Cove, Long Island, New York, of the sum of $6,000. being the balance of a written subscription or pledge of $12,000. made by the decedent during his lifetime to said hospital, and a payment by the Executors to Princeton University, Princeton, New Jersey, of the sum of $5,000., being the balance of a subscription of $25,000, made by the decedent during his lifetime for the purpose of erecting in the University Chapel a bay containing a memorial window in memory of decedent's son who lost his life in the World War, were not deductible from the gross estate of the decedent for the purposes of Federal Estate Tax. The petitioners allege that such payments are proper deductions.

[fol. 118] III

The said taxpayer being aggrieved by the Findings of Fact and Conclusion of Law contained in said Findings and Opinion, Decision and Order of the Board of Tax Appeals, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Second Circuit, in accordance with the provisions of the Revenue Act of 1926.

IV

Assignments of Error

The errors committed by the Board of Tax Appeals upon which the Petitioners rely as a basis of this proceeding are as follows:

1. The Board of Tax Appeals erred in failing to decide whether or not the respondent correctly included the property described in Trust No. 3 as part of the decedent's gross estate under Section 302 (c). The Board of Tax Appeals should have decided that the respondent should not have included the property described in Trust No. 3 as part of decedent's gross estate under Section 302 (c).

2. The Board of Tax Appeals erred in failing to pass upon petitioners' assignment of error that Section 302 (c) is unconstitutional if applied to Trust No. 3 in this case.

[fol. 119] 3. The Board of Tax Appeals erred in holding that the entire value of the property included in all said trusts mentioned in this petition should be included in the gross estate of decedent for Federal Estate Tax under the provisions of Section 302 (d) because of the reservation of the powers to modify or alter expressed in Paragraph Tenth of said trust instruments. The Board of Tax Appeals erred in so holding as to all of said instruments and also in so holding as to each of them and also *as* in so holding as to either or any of them. The Board of Tax Appeals erred in failing to hold that if Section 302 (d) of the Revenue Act of 1926 requires the inclusion of the entire value of the property included in all of said trusts in the decedent's gross estate for Federal Estate Tax because of the provisions of Article Tenth of each of said instruments, then to such an extent the statute is unconstitutional and void.

4. The Board of Tax Appeals erred in failing to hold that none of the property described in any of the trusts mentioned in this petition should be included in decedent's gross estate for Federal Estate Tax purposes.

5. The Board of Tax Appeals erred in failing to hold that the payment by petitioners of $6,000. to the New North Country Community Hospital on account of the pledge by decedent to said institution was a proper deduction as a "claim against the estate" under Section 303 (a) (1) of the Revenue Act of 1926.

[fol. 120] 6. The Board of Tax Appeals erred in failing to hold that said payment on account of said pledge was a proper deduction as a transfer to or for the use of a corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, under Section 303 (a) (3) of the Revenue Act of 1926.

7. The Board of Tax Appeals erred in failing to hold that the payment by petitioners of $5,000. to Princeton University on account of the pledge by decedent to said institution was a proper deduction as a "claim against the estate," under Section 303 (a) (1) of the Revenue Act of 1926.

8. The Board of Tax Appeals erred in failing to hold that said payment to Princeton University on account of said pledge was a proper deduction as a transfer to or for the use of a corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, under Section 303 (a) (3) of the Revenue Act of 1926.

9. The Board of Tax Appeals erred in determining a deficiency of $10,676.35 in Federal Estate Tax on the Estate of William H. Porter, deceased.

10. The Board of Tax Appeals erred in not determining that there is due Petitioners a refund of $5,947.78, Federal Estate Tax overpaid on account of the said estate.

Wherefore your petitioners pray that the United States Circuit Court of Appeals for the Second Circuit review the action of the United States Board of Tax Appeals in [fol. 121] this case in holding that the property transferred in the aforesaid Trusts by the decedent, formed a

part of his taxable estate for Estate Tax purposes and in failing to allow as a deduction in determining the net taxable estate of decedent the amounts paid by the Executors of the decedent's estate on account of pledges made by the decedent during his lifetime and for which his estate was legally liable and in determining a deficiency in the Estate Tax in the amount of $10,676.35, that the said Court reverse the decision of the United States Board of Tax Appeals and direct the entry of a decision by said Board in favor of the petitioners determining that there is due the petitioners a refund of $5,947.78 on account of an over-payment of said Estate Tax, and your petitioners pray for such other and further relief as may to the Court appear proper in the premises.

Esther Jackson Porter, as Executrix, and Richard L. Davisson, as Surviving Executor, of the Estate of William H. Porter, Deceased, Petitioners. Address: 7 Dey Street, New York, N. Y. Edward N. Perkins, Counsel for Petitioners, 15 Broad Street, New York, N. Y.

[fols. 122 & 123] *Duly sworn to by Esther J. Porter and Richard L. Davisson. Jurats omitted in printing.*

[fol. 124] Before United States Board of Tax Appeals

Docket No. 42815

Esther Jackson Porter, as Executrix, and Richard L. Davisson, as Surviving Executor, of the Estate of William H. Porter, Deceased, Petitioners,

vs.

Commissioner of Internal Revenue, Respondent

Statement of Evidence—Filed Feb. 17, 1932

Hearing at Washington, D. C., October 30, 1930

Appearances

Richard L. Davisson, Esq., Henry Mannix, Esq., and E. J. Corcoran, Esq., all of New York City, for the Petitioners.

L. S. Pendleton, Esq. (Clarence M. Charest, Esq., General Counsel, Bureau of Internal Revenue), for the Commissioner of Internal Revenue, Respondent.

[fol. 125] MOTION TO AMEND ANSWER

By Mr. Pendleton: "The respondent moves to amend his answer by alleging:

"(1) That in determining the deficiency tax shown in the sixty-day notice, dated December 22, 1928, the Commissioner excluded from the gross estate the value of a transfer in trust made October 18, 1918, in the sum of $107,500, made up of $105,625, corpus, and $1,875, accrued income; that in determining the deficiency as aforesaid the Commissioner excluded from the gross estate the value of a transfer in trust made on June 27, 1919, and not on February 1, 1919, as stated in the sixty-day notice, in the sum of $108,625, made up of $106,375, corpus, and $2,250, accrued income; that in excluding the value of the corpus of the two trust funds, he erred.

"(2) That there should be included in the gross estate of the decedent $105,625, representing the value of the transfer in trust made on October 18, 1918, and $106,375, representing the value of the transfer in trust made on June 27, 1919.

"(3) That the said transfers are taxable as a part of the decedent's gross estate under the provisions of Section 302 (d) of the Revenue Act of 1926.

"Wherefore it is respectfully prayed that the deficiency be increased in the proper amount."

[fol. 126] By the Member: "The motion is allowed. You will file that, please, as a written amendment."

By Mr. Pendleton: "I have it written. Yes, sir."

(The written amendment was thereupon filed by Mr. Pendleton, and made a part of this record.)

REPLY TO AMENDMENT TO ANSWER

By Mr. Mannix: "If your Honor please, in reply to the amendment to the Commissioner's answer, respondent admits:

" 'That in determining the deficiency tax shown in the sixty-day notice, dated December 22, 1928, the Commissioner excluded from the gross estate the value of a trans-

fer in trust made October 18, 1918, in the sum of $107,500, made up of $105,625, corpus, and $1,875, accrued income; that in determining the deficiency as aforesaid the Commissioner excluded from the gross estate the value of a transfer in trust made on June 27, 1919, and not on February 1, 1919, as stated in the sixty-day notice, in the sum of $108,625, made up of $106,375, corpus, and in $2,250, accrued income;'

"The petitioner denies, however, in excluding the value of the corpus of the two trusts, the Commissioner erred. He denies such error.

"The petitioner further denies the allegation set forth in paragraph 2 of the amendment to the answer namely:

[fol. 127] " 'That there should be included in the gross estate of the decedent $105,625, representing the value of the transfer in trust made on October 19, 1918, and $106,375, representing the value of the transfer in trust made on June 27, 1919.'

"The petitioner further denies the allegation contained in paragraph 3 of the amendment to the answer namely:

" 'That the said transfers are taxable as a part of the decedent's gross estate under the provisions of Section 302 (d) of the Revenue Act of 1926'."

By Mr. Mannix: "May we have ten days or a week in which to submit the written reply?"

By the Member: "That will be all right."

AMENDMENTS TO PETITION

By Mr. Davisson: "Your Honor, I now move the following amendments to the petition:

"I move to amend paragraph 4 of the petition so as to allege a new sub-paragraph, namely sub-paragraph (d), to read as follows:

"The error of the respondent in not allowing a credit against the Federal estate tax liability of the estate on account of the New York estate tax paid by said estate to this date, and to be paid within three years from the date of the filing of the Federal estate tax return.

"I also move to amend paragraph 5 of the petition so as to allege the necessary facts to support the error just referred to.

[fol. 128] "Accordingly, I move to amend paragraph 5 by adding a new sub-paragraph, to be sub-paragraph (u), reading as follows:

"Within three years after the filing of the Federal estate tax return for said estate, the executors actually paid to the State of New York the sum of $833,402.42, which said sum includes the payment of $750,000 referred to in the preceding paragraph, on account of the New York estate tax liability of the estate in respect of property included in the gross estate for Federal estate tax purposes, and petitioner claimed credit therefor within the said three year period with the respondent herein."

By Mr. Manning: "I hope your Honor will pardon us for presenting our amendments in such a halting manner, but we were faced with the necessity of making such amendments for the first time upon being advised by the respondent of the proposed increase, as covered by his amendment, in the deficiency.

"We move to further amend paragraph 5, by adding a new sub-paragraph, to be sub-paragraph (v), reading as follows:

" 'The estate will be required to pay a further amount on account of New York estate tax, in addition to that set [fol. 129] forth in sub-paragraph (u). If the increase in the deficiency as proposed in the amendment to the respondent's answer is sustained, said further New York estate tax will be 80% of the amount of the increase in the deficiency. The petitioner will pay said additional amount of New York estate tax by November 30, 1930, which will be within three years from the date of the filing of the Federal estate tax return. The petitioner hereby makes claim for credit for said further New York estate tax liability, and requests permission of the Board to submit subsequent to this hearing proof of said further payment'."

By the Member: "Is there any objection to those amendments?"

By Mr. Pendleton: "No objection, your Honor, I would like to have any opportunity to go over the proposed amendments after they have been written up, and reply."

By the Member: "Of course, if there is no objection, they will be granted, * * *."

PRIMUS E. GODRICH, being first duly sworn, testified as follows:

I am trust officer of Bankers Trust Company. I have been employed by Bankers Trust Company since 1913, first, as a clerk, then, as assistant trust officer from June 5, [fol. 130] 1917, and, later, as trust officer from January 16, 1923. In 1918 and 1919 I was an assistant trust officer. I had entire responsibility as such for the administration and handling of the two trusts created by Mr. Porter under date, October 18, 1918, and February 1, 1919, for the benefit of Helen Porter Davisson (Exhibits B and C to the petition in this proceeding).

By Mr. Mannix: "May we introduce in evidence at this point the petition as amended, together with the exhibits attached thereto?"

By the Member: "Is there any objection?"

By Mr. Pendleton: "No objection, your Honor."

By the Member: "Very well, they will be received in evidence."

By the witness, Mr. Godrich: I am familiar with the three instruments dated November 27, 1926, constituting Exhibits D, E, and F of the petition to this proceeding. I had personal knowledge in connection with the execution of those instruments. The instruments were prepared by Messrs. White & Case, attorneys for Mr. William H. Porter, and for the Bankers Trust Company, and after execution by Mr. Porter on November 27, 1926, were presented to me as assistant trust officer. I had to do with the negotiations leading up to the preparation of those instruments. On October 25, 1926, Bankers Trust Company re- [fol. 131] ceived from Mr. Porter a letter dated October 23, 1926, requesting a modification of his trust for the benefit of his daughter Mrs. Davisson, dated February 1, 1919, which was referred to White & Case, who were attorneys for Mr. Porter and the Bankers Trust Company, with the request that they make the instrument of modification requested by Mr. Porter. The letter now shown me from me to Messrs. White & Case dated October 25, 1926, is an original letter of that date forwarding Mr. Porter's original letter of October 23, 1926, and requesting the modification of the agreement.

(Letter offered and received in evidence as Petitioner's Exhibit No. 1.)

By Mr. Davisson: "May I have leave to file a photostatic copy of the letter instead of the original?"
By the Member: "I assume there is no objection to that."
By Mr. Pendleton: "No objection to that."
By the Member: "All right, sir."

(The document so offered and received in evidence was marked Petitioner's Exhibit No. 1 and made a part of this record.)

By the witness, Mr. Godrich: I do not know where the original of Mr. Porter's letter dated October 23, just referred to, is. I personally have searched the files of the Bankers Trust Company and White & Case have also searched their files without success. I really looked through [fol. 132] the files of White & Case myself because I was positive they had it. The original letter shown me from White & Case to Bankers Trust Company dated October 25, 1926, was received by the Bankers Trust Company, but we have been unable to find it in our files. I personally have searched all the files of Bankers Trust Company where that letter might be filed without success.

(Carbon copy offered and received in evidence without objection as Petitioner's Exhibit No. 2.)

By Mr. Davisson: "May I put the photostat copy in?"
By the Member: "I presume there is no objection to that."
By Mr. Pendleton: "No objection."
By the Member: "Very well."

(The document so offered and received in evidence was marked Bankers Exhibit No. 2 and made a part of the record.)

By the witness, Mr. Godrich: I have been in the employ of Bankers Trust Company for eighteen years continuously, first, as clerk in the trust department, and I am familiar intimately with the filing system of that department and have daily occasion to refer to papers in that filing system. I requested our filing department to present to me all the files relating to transactions with Mr. Porter in connection with the various trusts since the inception of

each trust. In addition I requested our filing department [fol. 133] to refer to me files of similar name. I have exhausted every means at my disposal that would enable me to locate the original letter and I am firmly convinced it is misfiled or lost. I believe that when this letter was returned by Messrs. White & Case in their letter of October 25, 1926, that I received a letter from Mr. Porter and sent it by hand to Messrs. White & Case who are on the twenty-fifth floor of our building. There is a letter from White & Case dated October 25, 1926, returning the instrument and modification; also Mr. Porter's letter of October 23, 1926.

By Mr. Pendleton:

Q. "In this letter of October 25, 1926, addressed to Bankers Trust Company, it is stated "'We also return the papers which accompanied your letter.' And at the bottom there is marked 'Enclosure'. Have you any recollection of what the enclosure was?

A. The enclosure was the photostat copy of Mr. Porter's trust agreement, dated February 1, 1919, which we submitted to counsel, in order that they might prepare the necessary instrument of revocation requested by Mr. Porter; second, Mr. Porter's letter of October 23, 1926, and third, the instrument of revocation which I had requested them to prepare in my letter of October 25, 1926."

[fol. 134] Q. "You just referred to this as revocation?

A. Instrument of revocation."

Q. "Well, which is right?

A. Instrument of modification."

"By Mr. Davisson:

Q. "You are quite clear in your mind that what Mr. Porter asked you to do was a modification and not a revocation?

A. Absolutely. Why I am so emphatic on that point is by reason of the fact that Mr. Porter called us on the telephone and asked why we had referred to his trust agreement, dated February 1, 1919 as 'Trust No. 2'. We responded by saying that he had made a prior trust agreement dated October 18, 1918, which we had designated as 'Trust No. 1', in order to differentiate the two trusts. That brought to Mr. Porter's mind the thought that he had another trust with Bankers

Trust Company, and in a subsequent letter he requested the modification of the first agreement along similar lines that he had requested the modification of the 1919 agreement."

(The respondent's objection to the introduction parol testimony of the contents of the letter as not being the best evidence was overruled and the respondent was allowed an exception.)

By Mr. Pendleton: "Yes, I would like to have an exception, your Honor."

By the Member: "All right, sir."

[fol. 135] By the witness, Mr. Godrich: The letter in question was a request from Mr. Porter, directing a modification of his trust, dated February 1, 1919, in order to provide for two grandchildren who were born after the date of the instrument. The original instrument as executed by him directed the payment of income to his daughter for life, or until she reached the age of thirty, and upon her death leaving her son Richard L. Davisson, Jr., then the trust was to continue for his benefit until he reached the age of thirty, but Mr. Porter, realizing that in 1926 two other grandchildren were born to his daughter, wished to provide for them in the same manner that he had provided for Richard L. Davisson, and consequently requested Bankers Trust Company to procure a modification of the agreement. This carbon copy of a letter, dated Octobed 25, 1926, addressed to Mr. William H. Porter re Helen Porter Davisson Trust No. 2, is a carbon copy of my letter enclosing the modification of the agreement prepared by White & Case, which was delivered to Mr. Porter.

Mr. Davisson: "I offer this letter in evidence (handing the letter to Mr. Pendleton).

Mr. Pendleton: "I object to it, your Honor, on the ground that the failure to produce the original has not been proved."

Mr. Davisson: "I am going on the stand, your Honor—I can do it now, if you wish—to testify that I, as executor, received from Mr. Porter's secretary all of his correspond-[fol. 136] ence files, and they are now in my office, and I have searched diligently through those files for the original, and cannot find it."

The Member: "I understood the witness that that was a carbon copy. That is practically a duplicate original, as I understand it. That is what a carbon means."

Mr. Davisson: "Yes, sir."

The Member: "The objection is overruled, and an exception noted."

Mr. Pendleton: "An exception; yes, sir."

(The document so offered and received in evidence was marked Petitioners' Exhibit No. 3 and made a part of this record.)

By the witness, Mr. Godrich: I personally dictated the letter and placed my initial "G" on the letter at the time the letter was dictated. On this very paper. This carbon copy of a letter, dated October 28, 1926, addressed to Mr. William H. Porter and signed by H. F. W., vice-president, was written in response to Mr. Porter's inquiry over the telephone asking why we had indicated in our letter of October 25th "Helen Porter Davisson Trust No. 2". This letter explains to Mr. Porter that he has established two agreements, one dated February 1, 1919, which Mr. Porter referred to in his letter of October 23, 1926, requesting a modification of the agreement, and a prior trust desig- [fol. 137] nated as Trust No. 1, dated October 18, 1918. This letter was presented by me to Mr. Porter personally.

(Letter offered and received in evidence over Mr. Pendleton's objection, to whom an exception was allowed, and to Mr. Davisson's request, and without objection a photostat was permitted to be filed. The document so offered and received in evidence was marked Petitioner's Exhibit No. 4 and made a part of this record.)

By the witness, Mr. Godrich: H. F. W., whose initials are on the Exhibit No. 4, is senior vice-president of Bankers Trust Company in charge of the trust department, and his name is "H. F. Wilson, Jr." This original letter signed "Wm. H. Porter" and addressed to Bankers Trust Company, October 29, 1926, came into my hands as assistant trust officer on October 30, 1926. It is produced from the file of Bankers Trust Company.

(Letter offered and received in evidence and, on Mr. Davisson's request, a photostat permitted to be filed in lieu of the original. The document so offered and received in evidence was marked Petitioner's Exhibit No. 5 and made a part of this record.)

By the witness, Mr. Godrich: After the correspondence just introduced in evidence White & Case prepared the necessary instruments and these were executed by Mr. Por- [fol. 138] ter November 27, 1926, and delivered to me as assistant trust officer to Bankers Trust Company. Exhibits D, E, and F attached to the petition are photostat copies of the original instrument signed by Mr. Porter. Other than these three instruments there were no alterations, modifications, or revocations of any nature made to the original trusts, dated October 18, 1918, and February 1, 1919, being Exhibits B and C of the petition in this proceeding. The trust deed of October 18, 1918, and that dated February 1, 1919, Exhibits B and C attached to the petition, specify certain securities delivered to Bankers Trust Company under those instruments and those are the securities which in fact were delivered to the Bankers Trust Company on or about the dates of those instruments. Bankers Trust Company still has those securities. I inspected them yesterday morning, comparing the securities listed in the instruments with those on file in our vault and they are the original securities delivered under the first agreement dated October 18, 1918, and the second agreement dated February 1, 1919. Bankers Trust Company neither, before nor after, nor during the execution of the instruments surrendered the sole possession of these securities, and if Mr. Porter had handed me an instrument purporting to revoke the trust and demanding the return of the securities I would not have delivered them to him. Bankers Trust Company is now holding under the instruments, Exhibits D, E, and F to the petition in this proceeding, the original [fol. 139] securities delivered them under the two trusts delivered them in 1918 and 1919 for the benefit of Helen Porter Davisson. There have been no sales or reinvestments of any of the original property delivered by Mr. Porter to Bankers Trust Company as trustee in 1918 and 1919 under said instruments. We hold the original securities delivered to us by the donor on the respective dates. Bank-

ers Trust Company has not, and will not, receive any commission on the principal of these trust funds. The securities of these trusts are held in our vault and the income is remitted to the beneficiary semi-annually on the date of collection. There has never been any refusal on Mrs. Davisson's part to accept the income remitted to her. In regard to my testimony as to the motive or purpose of the decedent in writing the letters introduced in evidence, I am not merely stating my conclusion. I base this on three grounds: First, on my letter of October 25, 1926, to White & Case requesting White & Case to prepare a modification of the agreement to meet the donor's wishes; second, a letter addressed to the donor enclosing the instrument of modification expressly stated in my letter to Mr. Porter; third, on Mr. Porter's own letter, dated October 28, 1926, requesting a modification of the trust dated October 18, 1918. In none of those letters was there a word of revocation mentioned, merely a modification. My statements in reference to the contents of Mr. Porter's letter of October 23, 1926, would not represent merely my construction placed on what he said in that letter. I have independent [fol. 140] recollection of the terms of that communication because this was the only transaction in which I ever had direct dealings with Mr. Porter and it was a matter of personal gratification to me that I should have the privilege of conferring with one of the captains of industry in the United States. I knew Mr. Porter's personal affairs with the Bankers Trust Company as embraced in those trusts. I had two or three personal conversations with Mr. Porter about these trusts touching the instruments of 1926, and he stated that the purpose was to provide for two grandchildren born subsequently to the original instrument.

Mr. Richard L. Davisson, being first duly sworn, testified as follows:

I am one of the petitioners and surviving executors of William H. Porter's estate.

Stipulation as to Certain Facts

By Mr. Mannix: "It is stipulated and agreed by and between counsel for petitioner and counsel for the respondent that:

"On May 12, 1927, payment was made to James W. Townsend, treasurer of the New North Country Community Hospital the sum of $6,000 as the balance of a written subscription or pledge of $12,000 made by decedent during his lifetime to the New North Country Community Hospital at Glen Cove, Long Island. This subscription was made by [fol. 141] decedent, William H. Porter, for the specific purpose of equipping an X-Ray room in the said hospital as a memorial to his son, who lost his life in the World War. During the decedent's lifetime, the construction of said hospital was actually undertaken, and an X-Ray room was provided therein in reliance on said promise of decedent.

"It is further stipulated and agreed by and between counsel for the respective parties that:

"On May 12, 1927, there was paid to Princeton University the sum of $5,000 as the balance of a subscription of $25,000 made by decedent during his lifetime for the purpose of erecting in the University Chapel to be built at Princeton, New Jersey, a bay containing a Memorial Window in memory of decedent's son who lost his life in the World War. Princeton University had procured drawings and sketches of such bay and window to be made and had actually contracted for and commenced construction of the same during decedent's lifetime in reliance on said subscription.

"The petitioner now withdraws the claim for a deduction in computing the net estate on account of the remaining pledges referred to in paragraph 5 of the petition, aggregating some $2,025. In other words, the only claim for deduction made on account of payments under pledges is [fol. 142] for the $6,000 payment made to the New North Country Community Hospital and for the $5,000 payment made to Princeton University.

"It is further stipulated that the payments referred to in the foregoing stipulation were made by the executors of the estate on the date referred to therein, namely May 12, 1927.

"It is further stipulated that no deduction was allowed to the estate in computing the net estate for the sums paid by the estate on account of said pledges."

"Mr. Pendleton: That stipulation is satisfactory to the respondent, your Honor. He joins in it. The effect of it is merely to admit the facts alleged in paragraphs (m)

and (n) on page 9 of the petition, and the paragraph following is (r) on page 10, and petitioner withdraws his allegations of error as to paragraphs (o), (p) and (q)."

By the witness, Mr. Davisson: As executor I have possession of Mr. Porter's files which purport to be the full and complete files. I got them from the firm of J. P. Morgan & Company, out of Mr. Porter's private office. I have searched those files for the purpose of locating the carbon copy of the letter written October 23, 1926, to Bankers Trust Company, which Mr. Goodrich referred to in his testimony. I also tried to locate the original letter from the Bankers Trust Company to Mr. Porter, dated October [fol. 143] 25, 1926, and the original letter from Bankers Trust Company to Mr. Porter, dated October 28, 1926. I was not able to find either the copies of these letters or the originals. I personally searched through the files and my associate Mr. Corcoran who is here checked my search. We both failed to discover them. I got Mr. Porter's former secretary Mr. Matthews, who had kept the files, to spend several hours going through them. I cannot explain the absence of the missing letters. There is only one other place where those letters might be. Some papers, all supposed to antedate this period by a number of years were taken by Mrs. Porter to her house. At my request Mrs. Porter and Mr. Matthews, the former secretary, went there yesterday and went through these papers hoping to find these documents, but with no result.

(On behalf of the respondent, trust indenture dated the 18th of October, 1918, between William H. Porter and Bankers Trust Company endorsed "Jamie Porter Trust No. 1" was offered and received in evidence without objection marked Respondent's Exhibit A and made a part of this record; photostatic copy of trust indenture between William H. Porter and Bankers Trust Company, dated June 27, 1919, endorsed "Jamie Porter Trust No. 2" was offered and received in evidence without objection marked Respondent's Exhibit B and made a part of this record; [fol. 144] letter dated September 29, 1928, addressed to Richard L. Davisson, et al., Executors, Estate of William H. Porter, known as tentative or thirty-day deficiency letter, was offered and received in evidence without objection for

the purpose of showing the computations marked Respondent's Exhibit C and made a part of this record.)

It is stipulated and agreed that the foregoing is a true and correct statement of the evidence upon the trial of this case relating to the issues involved in the petition for review by the Circuit Court of Appeals, and that it may be approved and ordered filed accordingly.

Edward N. Perkins, Attorney and Counsel for the Petitioner. C. M. Charest, Counsel for Respondent.

Approved and ordered filed February 17th, 1932.

Eugene Black, Member United States Board of Tax Appeals.

[fol. 145] PETITIONER'S EXHIBIT No. 1

(Letterhead of Bankers Trust Company)

16 Wall Street,
New York, October 25, 1926.

Re Helen Porter Davisson Trust No. 2

Messrs. White & Case, 14 Wall Street, New York City.

GENTLEMEN: We enclose herewith photostat copy of Agreement, dated February 1, 1919, between William H. Porter and this Company, for the benefit of his daughter, Helen Porter Davisson.

We also enclose letter, dated October 23rd, from Mr. Porter, directing a modification of the agreement to provide for the payment of principal, upon the death of his daughter, to her children then living, and, if none, to his granddaughter, Jamie (Jane Hethering) Porter. I assume it will meet with the approval of Mr. Porter to provide in the modification that, should any of Mrs. Davisson's children die with issue, such issue shall take the share its parents would have taken, if living.

Will you please prepare this document as soon as possible?

Very truly yours, P. E. Godrich, Trust Officer.

PEG.KD.
#16.
Encls. By Hand.

[fol. 146] PETITIONER'S EXHIBIT No. 2

HDS:B. October 25, 1926.

Re Helen Porter Davisson Trust No. 2

Bankers Trust Company, 16 Wall Street, New York, N. Y.

DEAR SIRS:

Attention Mr. Godrich

In compliance with the request contained in your letter of October 25th, we have prepared and we enclose a modification of the Trust Agreement. We also return the papers which accompanied your letter. We have adopted your suggestion as to the issue of Mrs. Davisson's children.

Very truly yours, —— ——.

Enclosure.

[fol. 147] PETITIONER'S EXHIBIT No. 3

October 25, 1926.

Re Helen Porter Davisson Trust No. 2

Mr. William H. Porter, 45 East 68th Street, New York City.

MY DEAR MR. PORTER: I have pleasure in acknowledging receipt of your favor of the 23rd instant and shall have our attorneys prepare, in your behalf, a modification of your agreement, dated February 1, 1919, for the benefit of your daughter, Helen Porter Davisson, to provide for the payment of the principal, upon the death of Mrs. Davisson, to her three children, or surviving issue then living, and, if none, then to your grand-daughter, Jamie (Jane Hethering) Porter.

We have made proper notation on our records that the correct name of your grand-daughter is Jamie Porter.

Just as soon as we receive the instrument of modification from our attorneys, I shall immediately send it to you for signature.

With kindest personal regards, I am

Sincerely yours, W., Jr., Vice-President.

[fol. 148] PETITIONER'S EXHIBIT No. 4

October 28, 1926.

Mr. William H. Porter, 45 East 68th Street, New York City.

DEAR MR. PORTER: Referring to ours of October 25th and our subsequent conversation by telephone, we headed our letter—"Re: Helen Porter Davisson Trust No. 2"—because in your favor to us of October 23rd you referred to the Deed of Trust dated February 1, 1919 which we call "Trust No. 2", Trust No. 1 being the Indenture dated October 18, 1918.

We have had our counsel prepare a modification of the Trust Agreement of February 1, 1919 and understand we are to have the pleasure of a conference with you in the near future. If it would better suit your convenience I would be glad to have our Trust Officer, Mr. Godridge, call upon you.

Very sincerely yours, W., Jr., Vice-President.

HFW, Jr. MWC.
16.

[fol. 149] PETITIONER'S EXHIBIT No. 5

Received Oct. 30, 1926. Personal Trusts. Ans. 10/30/26 by P. E. G.

23 Wall Street, New York

October 29, 1926.

Bankers Trust Company, 16 Wall Street, New York City.

GENTLEMEN: Referring to the agreement contained in the Deed of Trust of the undersigned to you, dated October 18, 1918, the said deed, among other things, provided that in case of the death of Helen Porter Davisson, that one-quarter of the amount of said Trust shall go to Richard L. Davisson if living, and the remaining three-quarters shall go to the children of Helen Porter Davisson then living.

Inasmuch as the situation has changed considerably since said Deed of Trust was executed, and Richard L.

Davisson does not now need any consideration; and inasmuch as the said Deed provides that I may change the terms thereof if I see fit, now, therefore I wish to cancel the provision whereby Richard L. Davisson shall receive one-quarter of the amount covered by said Deed and Richard L. Davisson, Jr., three-quarters; and inasmuch as [fol. 150] Helen Porter Davisson now has three children, I wish to arrange that the full amount covered by said Deed shall go to the children of Helen Porter Davisson then living, and if there be no children of Helen Porter Davisson then living it shall go to Jane Hetherington Porter (so called) at the time said Deed of Trust dated October 18, 1918 was executed.

This is to advise you that the said Jane Hetherington Porter, so called, had not then been christened. When she was christened she was given the name of Jamie Porter in memory of her father, James Jackson Porter, who was killed in the World War, in the Argonne Forest in October 1918.

Please note accordingly on your books; and oblige,

Very truly yours, Wm. H. Porter.

[fol. 151] PETITIONER'S EXHIBIT No. 6

Estate of William H. Porter, 7 Dey Street

Telephone: Rector 4726

New York, October 28, 1930.

MT-ET-C1 4896-JEK.

Re Estate of William H. Porter, deceased, First District New York

Commissioner of Internal Revenue, New Internal Revenue Building, Washington, D. C.

DEAR SIR: The undersigned as the Surviving Executors of the Estate of William H. Porter, deceased, hereby claim credit against the Federal Estate Tax liability of said Estate due under the Revenue Act of 1926 for New York Estate Taxes actually paid in the amount of $833,402.42. The said amount represented the difference between eighty percent of the Federal Estate Tax liability of $1,325,321.98 determined in Treasury Department letter dated December

22, 1928 (MT-ET-C1 4896-JEK) and the total amount of other state inheritance taxes actually paid in the sum of $226,855.16. The said New York Estate Taxes and other state inheritance taxes were paid in respect of property included in the gross Estate for Federal Estate Tax purposes.

[fol. 152] Photostat copies of three receipts of the New York State Tax Commission, evidencing the payment of said New York Estate Tax, are attached as follows:

Receipt No. 20, dated May 26, 1927	$300,000.00
Receipt No. 85, dated May 25, 1928	450,000.00
Receipt No. 596, dated October 25, 1930	83,402.42
	$833,402.42

Since the computation of the New York Estate Tax is dependent upon the amount of Federal Estate Tax as finally determined, and since there is now pending before the Board of Tax Appeals a proceeding contesting the Commissioner's determination of the Federal Estate Tax liability in this Estate, the New York State Tax Commission has not yet rendered a final determination of the New York Estate Tax liability of said Estate and cannot do so until the Federal Estate Tax liability is definitely settled. The Executors are, therefore, not in a position to submit final receipts evidencing the payment of the New York Estate Tax, as required by the Regulations.

Very truly yours, Esther Jackson Porter and Richard L. Davisson, as Surviving Executors of William H. Porter, Deceased, by T. N. Stryker, Executor.

RLD:MCP.

[fol. 153] (Photostat Copy)

Form TT68. 10-7-25-2000 (26-2137).
Amount Paid: $300,000.00.

State of New York Tax Department

Temporary Receipt

Albany, May 26, 1927.

No. 20.

Received from Esther J. Porter, Richard L. Davisson, Herbert K. Twitchell, Ex'rs the sum of Three hundred

thousand & 00/100 Dollars being payment on account of the Estate Tax due upon the Estate of William H. Porter late of Nassau County, deceased.

Under Article 10-B of the Tax Law: Upon a final determination and assessment of tax and the surrender of this temporary receipt the final receipt in duplicate prescribed by law will be furnished.

State Tax Commission, by —— ——, Deputy Tax Commissioner.

[fol. 154] Form TT68. 10-7-25-2000 (26-2137).

Amount Paid: $83,402.42.

State of New York Tax Department

Temporary Receipt

Albany, Oct. 25, 1930.

No. 596.

Received from Esther J. Porter, Richard L. Davisson, Ex'rs. the sum of Eighty-three thousand four hundred two and 42/100 Dollars, being payment on account of the Estate Tax due upon the Estate of William H. Porter late of Nassau County, deceased.

Under Article 10-B of the Tax Law: Upon a final determination and assessment of tax and the surrender of his temporary receipt the final receipt in duplicate prescribed by law will be furnished.

State Tax Commission, by T. N. Stryker, Deputy Tax Commissioner.

[fol. 155] Form TT68. 10-7-25-2000 (26-2137).

Amount Paid: $450,000.00.

State of New York Tax Department

Temporary Receipt

Albany, May 25, 1928.

No. 85.

Received from Esther J. Porter, Richard L. Davisson and Herbert K. Twitchell, Exrs., the sum of Four hundred fifty thousand and no/100 Dollars, being payment on

account of the Estate Tax due upon the Estate of William H. Porter late of Nassau County, deceased.

Under Article 10-B of the Tax Law: Upon a final determination and assessment of tax and the surrender of his temporary receipt the final receipt in duplicate prescribed by law will be furnished.

State Tax Commission, by T. N. Stryker, Deputy Tax Commissioner.

[fol. 156] RESPONDENT'S EXHIBIT A

William H. Porter

to

Bankers Trust Company

Deed of Trust Dated October 18, 1918

This indenture, made the 18th day of October, 1918, between William H. Porter, of Glen Cove, Nassau County, New York, party of the first part (hereinafter called the "Donor"), and Bankers Trust Company, a corporation of the State of New York, having its principal offices in the Borough of Manhattan, City and State of New York, party of the second part (hereinafter called the "Trustee").

Whereas, the Donor desires to create a trust of the property and for the purposes hereinafter mentioned,

Now, therefore, this indenture witnesseth, that in consideration of the premises, the mutual covenants herein [fol. 157] contained, and of other good and valuable considerations, and of the sum of One Dollar ($1.00) to him in hand paid by the Trustee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Donor has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assign, set over and deliver unto said Trustee, its successors and assigns, the following described property and securities, to wit:

$100,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued for rapid transit construction.

Together with the appurtenances, and all the estate and rights of the Donor.

To have and to hold all and singular the above granted and described property and securities unto said Trustee, its successors and assigns, in trust nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set forth.

First. To receive, hold, manage, sell, invest and reinvest the same and every part thereof, in the manner hereinafter specified, and to collect, recover and receive the rents, issues, interest, income and profits thereof, and after deducting the commissions of the Trustee as hereinafter provided, and the proper and necessary expenses in connection [fol. 158] with the administration of the trust, to pay over the balance thereof, hereinafter called "Income" unto James J. Porter, the son of the Donor, until he shall attain the age of thirty years, and thereupon to convey, transfer and pay over to him, the said James J. Porter, the principal of this trust for his own use absolutely and forever.

In case of the death of said James J. Porter before he shall attain the age of thirty years, then upon his death to continue the trust for the benefit of his daughter Jane Hetherington Porter, and during her minority to apply such amount of income for the maintenance, education and support of said Jane Hetherington Porter as in the judgment of her mother Margaret K. Porter may be necessary, and to accumulate the balance during minority, and upon the said Jane Hetherington attaining her majority to pay over to her the accumulation of income, if any, and thereafter the income upon the trust until she shall attain the age of thirty years, at which time to convey, transfer and pay over the principal of the trust to said Jane Hetherington Porter for her own use absolutely and forever.

In case of the death of Jane Hetherington Porter before she shall attain the age of thirty years (but only in the event of the death of James J. Porter before he shall attain the age of thirty years), to convey, transfer and pay over one-fourth of the principal of the trust to Margaret K. Porter, if then living, and the balance thereof or the entire principal of the trust, if said Margaret K. Porter shall not [fol. 159] then be living, to the issue of said Jane Hether-

ington Porter in equal shares, and in default of issue surviving said Jane Hetherington Porter, then such balance thereof or the entire principal of the trust, if said Margaret K. Porter shall not then be living to Helen Porter Davisson, daughter of the Donor, for her own use, and in case of her prior death, in equal shares to the issue of said Helen Porter Davisson then living.

Second. The Trustee is authorized and empowered to retain, subject to the provisions hereof, any and all of the securities hereinbefore described in their present form, and also such additional properties as the Donor may from time to time add to the trust estate.

All investments or reinvestments made by the Trustee shall be subject to the control and written directions of the Donor during his lifetime, and the Trustee shall be fully protected in making any sale, investment or reinvestment as shall be directed by the Donor in writing during his lifetime and shall not be liable in any way for depreciation or loss incurred by reason of such sale, investment or reinvestment.

In the absence of any such written directions from the Donor, the Trustee shall be authorized to make such sales, investments or reinvestments as to the Trustee may seem proper and to the advantage of the estate, without regard to the investments prescribed by the laws of the State of New York for legal trust investments.

Upon the death of the Donor all investments or reinvestments shall be left to the discretion and judgment of the [fol. 160] Trustee, with full power and authority to retain any and all securities constituting the principal of the trust fund, and all further sales, investments or reinvestments shall be subject only to the control and discretion of the Trustee, and the Trustee shall not necessarily be limited to those securities prescribed by the laws of the State of New York for legal trust investments.

Subject to the limitations above prescribed, the Trustee shall have full power to sell and transfer any and all of said securities or any other property, real or personal, that may be taken under the terms of the trust, and to execute and deliver sufficient assignments, releases or satisfactions of bonds and mortgages, or other securities, or to sell and convey any real estate forming part of the trust estate and

to execute, acknowledge and deliver good and sufficient deed or deeds of conveyance therefor.

No purchaser upon any sale by the Trustee shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the validity, expediency or propriety of any such sale.

Third. In any case in which the Trustee is required, pursuant to the provisions of this indenture to divide the principal of the trust estate into parts or shares, or to distribute the same, it is authorized and empowered in its sole discretion to make such division or distribution in kind, or partly in kind and partly money, and for the purpose of such allotment the judgment of the Trustee con- [fol. 161] cerning the propriety thereof, and the relative value for the purpose of division or distribution of the property and securities so allotted, shall be binding and conclusive on all persons and corporations interested therein.

Fourth. Subject to the limitations above prescribed, the Trustee is authorized and empowered to vote in person or by proxy upon all stocks or other securities held by it; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation, at such times and upon such terms and conditions as the Trustee shall deem proper; to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation, or to the lease by any person or corporation of his or its property or any portion thereof, to such corporation, and upon such reorganization, consolidation, merger, sale or lease to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as the Trustee may deem expedient for the protection of its interests as holder of any stocks, bonds or other securities of any corporation, and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities, or take advantage of any rights to subscribe for additional stocks, bonds or other securities, and to make any and all necessary payments therefor, and generally to exercise in respect of all stocks, bonds [fol. 162] or other investments held by the Trustee here-

under all rights, powers and privileges as are or may be lawfully exercised by any person owning similar property in his own right provided, however, that the Trustee shall not be required to make any of the payments herein provided, except from the principal of the trust found, or from funds furnished for the purpose by the Donor.

In the event that the Trustee shall request from the Donor written instructions as to the action which it shall take in regard to any of the matters set forth in this paragraph, and the Donor shall neglect or refuse to furnish such instructions for a period of ten (10) days, or in the event that the Donor shall be unable for any reason to furnish such instructions, the Trustee is hereby authorized and empowered to take such action in regard to such matters as it may deem proper and desirable.

The Donor hereby expressly reserves to himself the privilege of increasing the principal of the trust estate, at any time by adding thereto personal property and securities which the Trustee shall receive, hold, manage, sell, invest and reinvest in the same manner as hereinbefore specified in respect of the securities forming part of the original fund.

Fifth. The Trustee may in its sole discretion cause the securities which may from time to time comprise the trust fund, or any part thereof, to be registered in its name as Trustee hereunder, or in its own name, or in the name of [fol. 163] its nominee, or to take and keep the same unregistered, and to retain them or any part thereof, in such condition that they will pass by delivery.

Sixth. The Trustee shall be entitled to receive as compensation for its services in the administration of this trust, a commission of one per cent. (1%) per annum upon income, and is hereby authorized to deduct such commission before paying the income to the beneficiary hereunder.

The Trustee also shall be entitled to a commission of one per cent. (1%) upon the market value of the trust fund when and as the trust shall terminate upon the death of the beneficiary above named.

The Trustee is also authorized, in the discharge of its duties, to employ counsel and agents and to determine and pay to them reasonable compensation, and it shall be entitled to reimbursement for the same, and for such other

expenses and charges as it may deem necessary and proper to incur.

Seventh. The Donor covenants and agrees to make, execute and deliver in due form of law such other and further assignments, conveyances or other instruments as the Trustee may deem requisite or necessary to effectuate the purposes hereof.

Eighth. The Trustee is further authorized and empowered to pay out of the income received from the trust fund any and all taxes which properly may become payable [fol. 164] from time to time, under the laws of the United States, or of any State, County or Municipality on said trust property, or for any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws.

Ninth. In case of securities taken or purchased for said trust fund at a premium, the Trustee shall not be bound to set aside any part of the income thereof as a sinking fund to retire or absorb such premium.

Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument [fol. 165] shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this

indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned.

Eleventh. The Trustee by joining in the execution of this instrument, signifies its acceptance of the trust.

Twelfth. It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

This instrument is made in duplicate, each of which is an original, but both taken together shall be deemed one and the same instrument.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by a Vice-President, and its corporate seal to be hereunto affixed and at- [fol. 166] tested by an Assistant Secretary as of the day and year first above written.

Wm. H. Porter. (Seal.) Signed, sealed and delivered in the presence of T. F. Mallaby. Bankers Trust Company, by F. N. B. Close, Vice-President. Attest: (Illegible,) Assistant Treasurer.

STATE OF NEW YORK,
County of New York, ss:

On this 18th day of October, 1918, before me personally came William H. Porter, to me known and known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

William R. Merrick.

STATE OF NEW YORK,
County of New York, ss:

On this 18th day of October, 1918, before me personally came F. N. B. Close, to me known, who, being by me duly

[fol. 167] sworn, did depose and say that he resides at Cranford, New Jersey; that he is a Vice-President of Bankers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

J. F. Grodley.

We hereby certify that the foregoing is a true copy of the original document.

Bankers Trust Company. P. E. Godridge.

Bankers Trust Company, New York. Supporting Schedule E. Jamie Porter Trust No. 1.

[fol. 168] RESPONDENT'S EXHIBIT B

William H. Porter

to

Bankers Trust Company

Deed of Trust Dated June 27, 1919

This Indenture made the 27th day of June, 1919, between William H. Porter, of Glen Cove, Nassau County, New York, party of the first part (hereinafter called the "Donor"), and Bankers Trust Company, a corporation of the State of New York, having its principal offices in the Borough of Manhattan, City and State of New York, party of the second part, hereinafter called the "Trustee").

Whereas, the Donor desires to create a trust of the property and for the purposes hereinafter mentioned.

Now, therefore, this Indenture witnesseth, That in consideration of the premises, the mutual covenants herein contained, and of other good and valuable considerations, [fol. 169] and of the sum of One Dollar ($1.00) to him in hand paid by the Trustee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Donor has granted, conveyed, assigned,

set over and delivered, and by these presents does grant, convey, assign, set over and deliver unto said Trustee, its successors and assigns, the following described property and securities, to wit:

$100,000 City of New York 4½% Corporate Stock, due June 1965; $50,000 of which stock was issued for the supply of water, and the remaining $50,000 for rapid transit construction,

Together with the appurtenances, and all the estate and rights of the Donor.

To have and to hold all and singular the above granted and described property and securities unto said Trustee, its successors and assigns, in trust nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set forth.

First. To receive, hold, manage, sell, invest and reinvest the same and every part thereof, in the manner hereinafter specified, and to collect, recover and receive the rents, issues, interest, income and profits thereof, and after deducting the commissions of the Trustee as hereinafter provided, and the proper and necessary expenses in connection [fol. 170] with the administration of the trust, to accumulate the balance thereof, hereinafter called "Income" for the benefit of Jane Hetherington Porter, a granddaugter of the Donor, during her minority, with the express authority, however, during such minority to apply such amount of the income as to the Trustee may seem necessary and proper for the maintenance, education and support of said Jane Hetherington Porter, and upon her majority to pay over to said Jane Hetherington Porter, the accumulation of income, if any, and thereafter the income upon the trust and until she shall attain the age of thirty-five years, at which time to convey, transfer and pay over the principal of the trust fund to said Jane Hetherington Porter for her own use, absolutely and forever.

In case of the death of Jane Hetherington Porter before she shall attain the age of thirty-five years, to convey, transfer and pay over the principal of the trust fund in equal shares to the children of said Jane Hetherington Porter, and in default of children surviving said Jane Hetherington Porter, then to Helen Porter Davisson,

daughter of the Donor, for her own use, and in case of her prior death, in equal shares, to the children of said Helen Porter Davisson then living.

Second. The Trustee is authorized and empowered to retain, subject to the provisions hereof, any and all of the securities hereinbefore described in their present form, and also such additional properties as the Donor may from [fol. 171] time to time add to the trust estate.

All investments or reinvestments made by the Trustee shall be subject to the control and written directions of the Donor during his lifetime, and the Trustee shall be fully protected in making any sale, investment or reinvestment as shall be directed by the Donor in writing during his lifetime and shall not be liable in any way for depreciation or loss incurred by reason of such sale, investment or reinvestment.

In the absence of any such written directions from the Donor, the Trustee shall be authorized to make such sales, investments or reinvestments as to the Trustee may seem proper and to the advantage of the estate, without regard to the investments prescribed by the laws of the State of New York for legal trust investments.

Upon the death of the Donor all investments or reinvestments shall be left to the discretion and judgment of the Trustee, with full power and authority to retain any and all securities constituting the principal of the trust fund, and all further sales, investments or reinvestments shall be subject only to the control and discretion of the Trustee, and the Trustee shall not necessarily be limited to those securities prescribed by the laws of the State of New York for legal trust investments.

Subject to the limitations above prescribed, the Trustee shall have full power to sell and transfer any and all of said securities or any other property, real or personal, that may be taken under the terms of the trust, and to execute [fol. 172] and deliver sufficient assignments, releases or satisfactions of bonds and mortgages, or other securities, or to sell and convey any real estate forming part of the trust estate and to execute, acknowledge and deliver good and sufficient deed or deeds of conveyance therefor.

No purchaser upon any sale by the Trustee shall be bound to see to the application of the purchase money arising

therefrom, or to inquire into the validity, expediency or propriety of any such sale.

Third. In any case in which the Trustee is required, pursuant to the provisions of this indenture to divide the principal of the trust estate into parts or shares, or to distribute the same, it is authorized and empowered in its sole discretion to make such division or distribution in kind, or partly in kind and partly money, and for the purpose of such allotment the judgment of the Trustee concerning the propriety thereof, and the relative value for the purpose of division or distribution of the property and securities so allotted, shall be binding and conclusive on all persons and corporations interested therein.

Fourth. Subject to the limitations above prescribed, the Trustee is authorized and empowered to vote in person or by proxy upon all stocks or other securities held by it; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation, at such times and upon such terms and conditions as the [fol. 173] Trustee shall deem proper; to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation, or to the lease by any person or corporation of his or its property or any portion thereof, to such corporation, and upon such reorganization, consolidation, merger, sale or lease to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as the Trustee may deem expedient for the protection of its interests as holder of any stocks, bonds or other securities of any corporation, and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities, or take advantage of any rights to subscribe for additional stocks, bonds or other securities, and to make any and all necessary payments therefor, and generally to exercise in respect of all stocks, bonds or other investments held by the Trustee hereunder all rights, powers and privileges as are or may be lawfully exercised by any person owning similar property in his own right, provided, however, that the Trustee shall not be required to make any of the payments herein provided, except from the principal of the trust

fund, or from funds furnished for that purpose by the Donor.

In the event that the Trustee shall request from the Donor written instructions as to the action which it shall take in regard to any of the matters set forth in this paragraph, and the Donor shall neglect or refuse to furnish [fol. 174] such instructions for a period of ten (10) days, or in the event that the Donor shall be unable for any reason to furnish such instructions, the Trustee is hereby authorized and empowered to take such action in regard to such matters as it may deem proper and desirable.

The Donor hereby expressly reserves to himself the privilege of increasing the principal of the trust estate, at any time by adding thereto personal property and securities which the Trustee shall receive, hold, manage, sell, invest and reinvest in the same manner as hereinbefore specified in respect of the securities forming part of the original fund.

Fifth. The Trustee may in its sole discretion cause the securities which may from time to time comprise the trust fund, or any part thereof to be registered in its name as Trustee hereunder, or in its own name, or in the name of its nominee, or to take and keep the same unregistered, and to retain them or any part thereof, in such condition that they will pass by delivery.

Sixth. The Trustee shall be entitled to receive as compensation for its services in the administration of this trust, a commission of one per cent (1%) per annum upon income, and is hereby authorized to deduct such commission before paying the income to the beneficiary hereunder.

The Trustee also shall be entitled to a commission of one per cent (1%) upon the market value of the trust fund when and as the trust shall terminate.

[fol. 175] The Trustee is also authorized, in the discharge of its duties, to employ counsel and agents and to determine and pay to them reasonable compensation, and it shall be entitled to reimbursement for the same, and for such other expenses and charges as it may deem necessary and proper to incur.

Seventh. The Donor covenants and agrees to make, execute and deliver in due form of law such other and further assignments, conveyances or other instruments as the Trus-

tee may deem requisite or necessary to effectuate the purposes hereof.

Eighth. The Trustee is further authorized and empowered to pay out of the income received from the trust fund any and all taxes which properly may become payable from time to time, under the laws of the United States, or of any state, county or municipality on said trust property or for any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws.

Ninth. In case of securities taken or purchased for said trust fund at a premium, the Trustee shall not be bound to set aside any part of the income thereof as a sinking fund to retire or absorb such premium.

Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of [fol. 176] the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned.

[fol. 177] Eleventh. The Trustee by joining in the execution of this instrument, signifies its acceptance of the trust.

Twelfth. It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

This instrument is made in duplicate, each of which is an original, but both taken together shall be deemed one and the same instrument.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by a Vice-President, and its corporate seal to be hereunto affixed and attested by an Assistant Secretary as of the day and year first above written.

Wm. H. Porter. (Seal.) Signed, sealed and delivered in the presence of T. F. Mallaby. Bankers Trust Company, by H. F. Wilson, Jr., Vice-President. Attest: —— ——, Assistant Secretary.

[fol. 178] State of New York,
County of New York, ss:

On this 27th day of June, 1919, before me personally came William H. Porter, to me known and known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

Thos. W. Joyce, Notary Public, etc.

State of New York,
County of New York, ss:

On this 27th day of June, 1919, before me personally came H. F. Wilson, Jr., to me known, who, being by me duly sworn, did depose and say that he resides at Upper Montclair, N. J.; that he is a Vice-President of Bankers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Frederick W. Buston, Notary Public, etc.

[fol. 179] We hereby certify that the foregoing is a true copy of the original document.

Bankers Trust Company. P. E. Godridge.

Bankers Trust Company, New York. Supporting Schedule E. Jamie Porter Trust No. 2.

RESPONDENT'S EXHIBIT C

MT-ET-C1-4896-CTK.
District of: First New York.
Estate of: William H. Porter.
Date of death: November 30, 1926.
Tentative deficiency: $178,291.47.

Sep. 29, 1928.

Richard L. Davisson et al., executors estate of William H Porter, 128 Broadway, New York, New York.

SIRS: The estate tax return filed for the above-named estate has been examined and a deficiency in respect of the tax has been tentatively determined.

If you acquiesce in the deficiency as determined, or in any part thereof, you may sign the enclosed waiver of the restrictions on the assessment of all or so much of the un-[fol. 180] discharged portion of the deficiency as results from adjustments in which you acquiesce and forward it to the Commissioner of Internal Revenue, Washington, D. C.

If you desire to protest against any portion of the deficiency such protest must be filed with the Commissioner of Internal Revenue within thirty days from the date of this letter. The procedure incident to the filing of a protest is governed by the Regulations relating to Estate Tax, copies of which may be obtained upon application to the Collector or to this office.

This determination is tentative only and no petition therefrom lies to the Board of Tax Appeals. If upon further consideration at the expiration of the thirty day period for filing protest it appears that a deficiency in respect of the tax exists final determination thereof will be made and you will be notified by registered mail in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926.

Examination of the return discloses the following:

Correct amount of tax	$1,399,845.23
Tax shown on the return	1,221,553.76
Deficiency	$178,291.47

There will be assessed and collected, as a part of the deficiency, interest thereon at the rate of six per centum per annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a [fol. 181] waiver of the restrictions on the assessment, whichever is the earlier.

Against the tax shown on the return credit was claimed in the amount of $958,982.33. Proof has been submitted of the payment of State inheritance taxes in the aggregate amount of $226,855.16. No credit can be allowed on account of the payment of $66.07 to the State of Ohio as penalty for delinquency in paying the State inheritance taxes. To permit the filing of additional evidence, action with respect to the claim for credit will be held in abeyance for not to exceed thirty days from the date of this letter.

The return has been verified as filed except as to the following changes:

Gross Estate

Stocks:

Stocks and bonds	Returned	Tentatively determined
Item 11, including dividend	$28,800.00	$28,725.00
Item 12	150,500.00	150,750.00
Item 27	0.00	3,000.00
Item 29	104,250.00	103,968.75
Item 33	15,600.00	15,650.00
Item 34	2,660.00	2,695.00
Item 35	191,250.00	189,375.00
Item 47	4,700.00	4,975.00
Item 58	46,337.50	46,200.00
Item 59	36,750.00	37,250.00
Item 77	4,800.00	4,787.50
Item 79	19,500.00	20,163.00
Item 87, including dividend	205,500.00	205,000.00
Item 90	10,750.00	10,725.00

[fol. 182] Other Miscellaneous Property:

Stocks and bonds	Returned	Tentatively determined
Item 7	0.00	500.00
Trustees' commissions, William H. Emory estate	0.00	7,464.31
Item 15	38,373.78	37,591.43
Transfers:		
Transfer in trust made November 27, 1926:		
$100,000.00 corporate stock, City of New York 4½%, due 1965, Rapid Transit	0.00	106,375.00
Accrued income thereon	0.00	2,250.00
$50,000.00 City of New York, 4½% bonds, due 1967, Rapid Transit	0.00	52,812.50
Accrued income thereon	0.00	937.50
$50,000.00 City of New York, 4½% bonds, due 1967, Water Supply	0.00	52,812.50
Accrued income thereon	0.00	937.50
Transfer in trust made October 18, 1918:		
$100,000.00 City of New York, 4½% bonds, due 1967, Rapid Transit	0.00	105,625.00
Accrued income thereon	0.00	1,875.00
Transfer in trust made February 1, 1919:		
$100,000.00 City of New York, 4½% corporate stock, due 1965, Water Supply and Rapid Transit		106,375.00
Accrued income thereon	0.00	2,250.00

[fol. 183] Deductions

	Tentatively determined	Returned
Funeral expenses	$130,198.74	$160,992.74
Executors' commissions	499,137.14	748,705.71
Miscellaneous administration expenses	26,826.18	57,509.05
Debts of decedent	1,022,766.82	1,196,602.76
To balance	926,180.09	

The enjoyment of the property in the trusts to which reference is made under "Transfers" was, at the time of the grantor's death, subject to change through the exercise by the decedent of powers to alter or amend the trusts. In each of the trust instruments there is the provision: "This power to modify or alter is not intended and shall not be construed to include the right to the donor to make such modification or alteration in his favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned."

MT-ET-C1-4896-CTK—First New York.
Estate of: William H. Porter.
Date of death: November 30, 1926.

Summary

	Returned (706)	Tentatively determined on review
Gross Estate:		
Real estate	$35,500.00	$35,500.00
Stocks and bonds	6,976,758.39	6,978,625.14
Mortgages, notes, cash, and insurance	19,915.55	19,915.55
Jointly owned property	0.00	0.00
Other miscellaneous property	4,764,682.40	4,771,864.36
[fol. 184] Transfers	0.00	432,250.00
Powers of appointment	0.00	0.00
Property identified as previously taxed	0.00	0.00
Total gross estate	11,796,856.34	12,238,155.05
Deductions:		
Funeral expenses	160,992.74	130,198.74
Administration expenses:		
Executors' commissions	748,705.71	499,137.14
Attorneys' fees	200,000.00	200,000.00
Miscellaneous	57,509.05	26,826.18
Debts of decedent	1,196,602.76	1,022,766.82
Unpaid mortgages	0.00	0.00
Net losses during settlement	0.00	0.00

	Returned (706)	Tentatively determined on review
Support of dependents	0.00	0.00
Property identified as previously taxed	0.00	0.00
Charitable, public, and similar gifts and bequests	27,500.00	27,500.00
Specific exemption (resident decedents only)	100,000.00	100,000.00
Total deductions	2,491,310.26	1,401,340.95
Net estate for tax	9,305,546.08	10,231,726.17
Total tax	1,221,553.76	1,399,845.23

Cag. (729M.) Treasury Department, Internal Revenue Bureau, Estate Tax Division. Form 7821A-Revised October, 1927.

[fol. 185] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE—Filed Feb. 9, 1932

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit a transcript of the record in this proceeding comprising copies duly certified as correct of the following documents and records in the above-entitled proceeding, in connection with the petition for review by the said Circuit Court of Appeals heretofore filed by the petitioners in said proceeding, namely:

I. Docket entries of the proceedings before the Board of Tax Appeals.

[fol. 186] II. Pleadings before said Board:

(a) Petition, with

(1) Exhibit A, Sixty-days letter;
(2) Exhibit B, Trust indenture;
(3) Exhibit C, Trust indenture;
(4) Exhibit D, Purported revocation;

(5) Exhibit E, Purported revocation;
(6) Exhibit F, Trust indenture;

(b) Answer;
(c) Amendment to Petition;
(d) Amendment to Answer;
(e) Reply to Amendment to Answer;
(f) Answer to Amendment to Petition;

III. Findings of Fact and Opinion of the Board of Tax Appeals.

IV. Order of Redetermination.

V. Petition for Review and Assignments of Error, with notice of filing and proof of service.

VI. Statement of the evidence as settled or agreed upon, with the exhibits therein noted as received in evidence at the hearing, namely, Petitioner's Exhibits 1 to 6, both inclusive, and Respondent's Exhibits A, B and C.

[fol. 187] VII. This Præcipe.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Edward N. Perkins, Attorney for the Petitioners for Review by the Circuit Court of Appeals, Second Circuit. (Mailing Address: 15 Broad Street, New York, N. Y.)

I hereby, this February 9th, 1932, accept due personal service of a copy of the foregoing præcipe.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

[fol. 188] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 189] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1931

No. 414

Argued May 17, 1932. Decided July 18, 1932

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. Davisson, as Surviving Executor, of the Estate of William H. Porter, Deceased, Petitioner, Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent, Appellee

Appeal from the United States Board of Tax Appeals

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Appeal by the petitioners from an order of the Board of Tax Appeals fixing a deficiency in their estate taxes for the year 1926.

Walter E. Hope, of New York City, for appellant.
Erwin N. Griswold, of Washington, D. C., for appellee.

OPINION

L. HAND, Circuit Judge:

Porter, the petitioners' testator, in 1918 and 1919, conveyed personal property to a trust company, under two deeds of trust, by which he created interests in specified beneficiaries, not necessary to set forth. Each deed reserved to him a sole power to revoke the appointments and substitute other beneficiaries, expressly excepting himself and his estate. He died in November, 1926, just before his death revoking the earlier deed and substituting another of the same kind. The chief question is whether the funds so conveyed are to be included as a part of his taxable estate under section 302 (d) of the Revenue Act of 1926, 26 U. S. C. A. §1094 (d). The pertinent language is as follows:

"The value of the gross estate * * * shall be determined by including the value * * * of all property * * * to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power * * * to alter, amend, or revoke."

The executors' argument is that as their testator had irrevocably parted with any interest in the property, the fact that he might change the beneficiaries at his pleasure is irrelevant; he had finally put it beyond his control; his reserved power to determine the eventual donees did not affect the definitiveness of his abandonment. There was therefore nothing on which to levy an excise; nothing certainly which could be treated as still a part of his estate.

The Commissioner answers that the power was in effect beneficial, despite its limitation. The donee might revoke the original limitation and select a facile beneficiary; might even make an agreement before hand that the substitute should unite with him to terminate the trust, as is possible in New York, when all the beneficiaries are in being. Personal Property Law (Consol. Laws N. Y. c. 41) § 23. In Meyer v. Bank of Manhattan Trust Co., 232 App. Div. 228, 249 N. Y. S. 640, the deed provided that it should not be revoked, but the settlor had a power to change the beneficiaries. He made his wife sole cestui que trust and with her consent successfully revoked the deed. In Faulkner v. Irving Trust Co., 231 App. Div. 87, 246 N. Y. S. 313, the settlor could not revoke until he was thirty-five years old, but by changing the beneficiary and getting the consent of [fol. 190] the substitute, he avoided the limitation. The Court of Appeals of that state has not, however, passed upon the point, and we are not entirely satisfied that the rights of existing beneficiaries can be circumvented by such a device. It may eventually be held that while the donee of the power is at liberty to revoke and reappoint at his pleasure, his choice must not violate the condition upon its exercise, either directly or indirectly. If so, the original interests are defeasible only when the settlor does not profit by the change, and equity will inquire whether this limitation has been observed, or whether the whole contrivance is in violation of the trust. As we think that this

part of the order should be affirmed anyway, we pass the point.

The language of section 302 (d) is broad enough to cover the case at bar. United States v. Field, 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617, 18 A. L. R. 1461, arose under the Act of 1916 (39 Stat. 756 as amended 39 Stat. 1000), which did not comprise general powers, and was decided for that reason. Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123, 124, 73 L. Ed. 410, 66 A. L. R. 397, involved the Act of 1921, where the relevant section (section 402 (c), 42 Stat. 278) read:

"To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust * * * intended to take effect in possession or enjoyment at or after his death."

The settlor has reserved a general beneficial power to revoke, whose termination by his death was treated as a taxable transfer. The theory was that, although the mere falling in of the remainders would not serve as such (a ruling repeated in May v. Heiner, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244), the settlor had in substance imposed a condition upon the interests originally limited, which his death removed. His reservation of control left them contingent; only when that ended were they finally confirmed. The settlor's death was therefore an event upon which an excise might be levied; and, since the settlor might at any time resume the property as his own, the funds could be included in his estate. Part of this applies with equal force to subject the funds at bar to an excise, since for that result it is immaterial that the settlor cannot reappropriate the property. Though he has finally denuded himself, he controls the disposition while he lives; the existing limitations are conditional upon his pleasure. A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends. Thus the subject matter of the tax was within the reach of Congress as much as any other transfer by

death; the only question is whether the statute has exceeded any constitutional limitations.

However, while there was a proper subject of taxation, it does not follow that the tax actually imposed was valid. It was computed upon an amount that included the trust funds as part of the testator's estate, which by hypothesis they were not; he had parted with them. If the deeds had been made after February 26, 1926, when the act was passed, we can see no difficulty; Congress may measure an excise as it will, certainly so long as it does not upset arrangements made in reliance upon an existing immunity. Any one setting up such trusts with the law before him would be charged with notice that they would subject his estate to taxes calculated as prescribed. None of the reasons on which Nichols v. Coolidge, 274 U. S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A. L. R. 1081, depended, exist in such a case; nor does the law attempt to tax one person for the property of another, as in Hoeper v. Tax Commission, 284 U. S. 206, 52 S. Ct. 120, 76 L. Ed. —. But the deed in fact antedated the law, and if it had been impossible for the testator to escape, possibly difficulties would have arisen. It might perhaps be held that the excise must be computed with some relation to the property disposed of; that it could not be reckoned by a graduated sale upon an amount which included the settlor's estate as well. That question has never, so far as we can find, been bruited; we raise it now merely by way of narrowing the issue, without suggesting an answer. We should have had to answer it, if there had been a complementary gift tax in the Act of 1926—appropriately worded (Guggenheim v. Commissioner, 58 F. (2d) 188 (C. C. A. 2)—making the revocation of such a power a transfer. In that event the donee could not escape, either by revoking the power, or leaving it unexercised till his death. But there was no gift tax, and the testator by relinquishing the power could have freed his estate altogether; he had ample season for this, for he did not die until some [fol. 191] eight months after the statute was passed. This seems to us to avoid any possible constitutional difficulties. If the power be regarded as the testator's property in a beneficial sense—a hypothesis we reject—Reinecke v. Northern Trust Co. rules; if it be regarded as limited to a change of beneficiaries from which he could not indirectly profit, he might abandon it and avoid the tax. Surely

there is no such hardship in the alternative as would justify holding that the inclusion of the estate in the base for computation denied him "due process of law." Especially as to taxes, courts are unwilling, except in the plainest cases, to declare statutes invalid for that reason. Treat v. White, 181 U. S. 265, 21 S. Ct. 611, 45 L. Ed. 853; McCray v. U. S., 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; U. S. v. Doremus, 249 U. S. 86, 39 S. Ct. 214, 63 L. Ed. 493; Billings v. U. S., 232 U. S. 261, 282, 34 S. Ct. 421, 58 L. Ed. 596. The tax was therefore valid and the Board was right.

The other question raised is of deductions claimed by the executors for payments made to fulfill the testator's benefactions. He had promised to Princeton University to pay the cost of a memorial window to be built for his son, killed in the war. To a hospital in Glen Cove, Long Island, he promised to pay for the building of an X-ray room, as another memorial. Each institution in reliance upon the promise performed the condition, and the executors paid. The record contains no evidence as to the character of either, but we take judicial notice that Princeton University is "organized and operated exclusively for * * * educational purposes," within section 303 (a) (3) of the Act of 1926, 26 U. S. C. A. § 1095 (a) (3). We can know nothing about the hospital. There are private hospitals, "part of the net earnings of which inures to the benefit of any private stockholder or individual." This may not be one, but upon the bare record we cannot assume so, and the taxpayer has the burden of proof.

Against this result the executors invoke section 303 (a) (1), 26 U. S. C. A. § 1095 (a) (1), which allows a deduction of "claims against the estate * * * to the extent that such claims * * * were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth." That the testator's promise created a valid contract nobody denies; "promissory estoppel" is now a recognized species of consideration (Restatement of Contracts, § 90); indeed, the doctrine first gained currency in cases like those before us. But the section was certainly not intended to include all contracts supported by a consideration; so much is clear. We need not limit it to cases where the consideration passes to the testator; for example, a promise to pay for goods delivered to another might fall within it, if the testator has recourse over. But if he has

not, the transaction is in substance a gift and must stand or fall with section 303 (a) (3). So here, though the testator was bound by his promise, what in fact he did was to give to the hospital a memorial to his son; it was not a financial bargain at all, and subdivision 1 is concerned with such. Had he delivered to it a bond under seal in a state where the common law still persists, the claim would hardly have been incurred for "full consideration in money or money's worth"; though the purpose were to use the proceeds to add to its equipment. The statute cannot have meant to make critical the accident that the hospital, by acting upon the promise, fastened a debt upon the estate. So to construe the language is to confuse the purposes of the two subdivisions.

Order affirmed, except as to the contribution to Princeton University.

[fol. 192] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the courtrooms, in the Post Office building, in the city of New York, on the 25th day of July, one thousand nine hundred and thirty-two.

ESTHER JACKSON PORTER, as Executrix, etc., et al.,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

JUDGMENT—Filed July 26, 1932

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, affirmed except as to the contribution to Princeton University.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 193] [File endorsement omitted.]

[fol. 194] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 195] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 14, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,163. U. S. Circuit Court of Appeals, Second Circuit. Term No. 466. Esther Jackson Porter, as executrix, and Richard L. Davisson, as surviving executor, of the estate of William H. Porter, deceased, petitioners, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed October 24, 1932. File No. 37,163.